Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ALABAMA INSURANCE GUARANTY ASSOCIATION, ET AL.,

Petitioners,

v.

UNITED STATES AND JOHN ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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120 pp

QUESTION PRESENTED

Does the claims bar provision of Massachusetts' comprehensive statutory scheme regulating the liquidation of insurance companies apply to claims of the United States because the provision "regulates the business of insurance", thereby affording such provision McCarran-Ferguson reverse preemption of the Federal Priority Act?

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

Petitioners are the Alabama Insurance Guaranty Association, California Insurance Guarantee Association, Connecticut Insurance Guaranty Association, District of Columbia Insurance Guaranty Association, Illinois Insurance Guaranty Fund, Louisiana Insurance Guaranty Association, Maine Insurance Guaranty Association, Massachusetts Insurers Insolvency Fund, Missouri Property and Casualty Insurance Guaranty Association, Nebraska Property and Liability Insurance Guaranty Association, Nevada Insurance Guaranty Association, New Hampshire Insurance Guaranty Association, Pennsylvania Workers' Compensation Security Fund, Rhode Island Insurers' Insolvency Fund, South Carolina Property and Casualty Insurance Guaranty Association, Texas Property and Casualty Insurance Guaranty Association, Vermont Property and Casualty Insurance Guaranty Association, and Virginia Property and Casualty Insurance Guaranty Association ("the Guaranty Funds") – the insurance guaranty funds for 17 states and the District of Columbia.

Pursuant to Supreme Court Rule 29.6, the Petitioners state that each of the Petitioner Guaranty Funds is a non-profit, unincorporated legal association. As a result, none of the Petitioner Guaranty Funds has a parent corporation or stockholders.

Respondents are the United States and John Ashcroft in his official capacity as Attorney General of the United States. Julianne Bowler, in her official capacity as the Commissioner of Insurance of the Commonwealth of Massachusetts and Permanent Receiver of American Mutual Liability Insurance Company and American Mutual Insurance Company

of Boston is the plaintiff in the underlying action and has filed a separate petition for a writ of certiorari in the same matter.

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The Petitioner Guaranty Funds respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case with respect to the issue of the state time bar.

OPINIONS BELOW

The opinion for the United States Court of Appeals for the First Circuit is reported at 303 F.3d 375 (1st Cir. 2002), and is reprinted as Appendix A, Pet. App. 1a- 21a. The memorandum opinion and order of the United States District Court for the District of Massachusetts, granting in part and denying in part the parties' cross-motions for summary judgment, are reported at 164 F. Supp. 2d 232 (D. Mass. 2001), and are reprinted as Appendix B, Pet. App. 22a-50a. The order of the First Circuit denying Petitioners' timely petition for panel rehearing and rehearing *en banc* is unreported, but is reprinted as Appendix C, Pet. App. 51a-52a.[1]

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on September 27, 2001. A timely petition for panel rehearing and rehearing *en banc* was denied on November 19, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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[1] The Receiver timely requested rehearing and rehearing *en banc* on October 11, 2002, and the Court of Appeals denied the Receiver's petition on October 31, 2002. Reprinted as Appendix D, Pet. App. 53a-55a.

STATUTORY PROVISIONS INVOLVED

The relevant portions of Mass. Gen. L. ch. 175, § 180F (2000), the Federal Priority Act, 31 U.S.C. § 3713 (2000), and the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* are reprinted as Appendixes E, F & G, Pet. App. 56a-62a.

Mass. Gen. L. ch. 175, § 180F states in pertinent part that: "[All claims in a liquidation proceeding begun in the Commonwealth of Massachusetts must] be filed on or before the last date fixed by the court for the filing of the claims in the domiciliary proceeding." Mass. Gen. L. ch. 175, § 180F (1992).

The Federal Priority Act states in pertinent part that: "A claim of the United States Government shall be paid first when . . .a person indebted to the Government is insolvent and . . . an act of bankruptcy is committed." 31 U.S.C. § 3713(a)(1)(A)(iii).

The McCarran-Ferguson Act states in pertinent part that: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b).

INTRODUCTION

The question presented by this petition affects hundreds of insurer liquidation proceedings pending nationwide and multitudes of policyholders involved in those proceedings. *See* National Association of Insurance Commissioners Contact List for Insurers in Receivership *at* http://www.naic.org/receivership/documents/Contact_List_for_insurers_in_receivership and http://www.naic.org/receivership/documents/2002_contact_list_for_insurers_in_receivership. At least 23 of those liquidation proceedings have been ongoing for more than a decade, in part due to the United States' asserted super-priority and purported

exemption from state bar dates such as the one at issue here. *See* Affidavit of Paul M. Gulko filed with the District Court in Support of Receiver's Motion for Summary Judgment, reprinted as Appendix H, Pet. App. 63a-94a, at Pet. App. 70a-72a, ¶ 23. The insurer liquidation proceeding giving rise to this action has been pending for over a decade and is now completely stalled because the United States refuses to give a conditional waiver of future claims to permit distributions. *See* Pet. App. 70a-72a, ¶¶ 22-24. Meanwhile, policyholders resident in and the insurance guaranty fund of every state, the District of Columbia, and the Commonwealth of Puerto Rico are left in the balance with claims unpaid and an effervescing nationwide problem for policyholders and guaranty funds created to protect policyholders. This Court should now resolve the question of whether a state's bar date – relating exclusively to insurer liquidation proceedings – applies to the United States.

STATEMENT OF THE CASE

This case arises from the liquidation of two insolvent insurance companies, American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston (collectively "American Mutual"), and the application of two state statutory provisions to claims made by the United States. Upon a finding of insolvency on March 9, 1989, a Massachusetts state court appointed the Commissioner of Insurance of the Commonwealth of Massachusetts as the Receiver of American Mutual. The state court also entered an order requiring creditors of American Mutual to file claims with the Receiver within one year of the liquidation date, i.e., by March 9, 1990.

The United States, as both a policyholder and a general creditor, filed claims with the Receiver. Some

of the claims of the United States were filed after the one-year bar date. As is typical in an insurer liquidation proceeding, the Receiver made preliminary distributions to the guaranty funds, entities established by statute in each of the fifty states, Puerto Rico and the District of Columbia to protect policyholders in the event of insolvency of their insurance company. Generally speaking, a guaranty fund pays the covered claims of policyholders and then in turn receives a statutory assignment of the policyholders' claims against the estate of the insolvent insurer. The United States consented to the preliminary distributions to the guaranty funds. However, upon the Receiver's filing of a liquidation plan with the state court on May 14, 1999, the United States declined to agree to the waiver requested, contending that, pursuant to the Federal Priority Act, 31 U.S.C. § 3713 (2000), the United States was entitled to priority distributions and was immune from the one-year bar date.

The Receiver's liquidation plan proposed distributions according to Massachusetts state law which, like the law of virtually every state, provides a priority distribution for policyholder claims and guaranty fund claims, over general creditor claims of the United States. *See* Mass. Gen. L. ch. 175, § 180F (2000); Pet. App. 56a-59a. The Receiver's plan also provides that late-filed claims will not participate in distributions. Because the assets of American Mutual are insufficient to satisfy all outstanding claims, the possibility that the claims of the United States will go unpaid if the United States is unable to assert the claimed super-priority is real. In addition, under the Federal Priority Act, the Receiver can be held personally liable for the non-payment of valid claims by the United States. *See* 31 U.S.C. § 3713(b) (2000); Pet. App. 60a.

As a result, the Receiver brought the underlying action, seeking declaratory judgment that the Federal

Priority Act, 31 U.S.C. § 3713, does not preempt two provisions of the Massachusetts statutory scheme regulating the liquidation of insurance companies: (1) the provision granting a liquidation priority to guaranty funds; and (2) the provision setting a time bar for all claims. *See* Mass. Gen. Laws ch. 175, §§ 180A-180L. Jurisdiction in the United States District Court for the District of Massachusetts ("the District Court") was proper pursuant to 28 U.S.C. §§ 1331 and 1346.

The District Court held that the McCarran-Ferguson Act afforded reverse preemption of the Federal Priority Act with respect to the priority assigned to guaranty fund claims.[2] *See* Pet. App. 22a-50a.[3] Relying on this Court's decision in *United States Dept. of Treasury v. Fabe*, 508 U.S. 491, 113 S. Ct. 2202, 124 L. Ed. 2d 449 (1993), the District Court reasoned that the Massachusetts priority scheme "regulated the business of insurance" because the prompt and potentially larger payments of covered policyholder claims afforded by guaranty funds are "reasonably necessary to further the goal of protecting policyholders". *See* Pet. App. 35a. With respect to the bar date, however, the District Court determined it was constrained by the First Circuit's post-*Fabe* decision in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993). As a result, the District Court

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[2] The District Court also denied the Guaranty Funds' Motion to Intervene, finding that the Commissioner adequately represented the interests of the Guaranty Funds and that intervention at that time based upon the potential that the Commissioner might fail to appeal an adverse judgment was premature. The First Circuit Court of Appeals ultimately granted the Guaranty Funds' Motion to Intervene "on a going forward basis". *See* Pet. App. 21a.

[3] Pursuant to Fed. R. App. P. 43 and an order dated August 9, 2002, Commissioner Bowler was substituted for former Commissioner Linda L. Ruthardt upon Bowler's appointment as Commissioner of Insurance for the Commonwealth of Massachusetts.

held that the one-year bar date did not "regulate the business of insurance" and was thus preempted by the Federal Priority Act. Significantly, the District Court noted that the *Garcia* court "may have understated" and "seems to have been insufficiently sensitive to" the direct effect on policyholders of late-filed federal claims. *See* Pet. App. 40a-41a. Nevertheless, the District Court went on to conclude that the Court of Appeals and not the District Court had the prerogative to overrule precedent established by an appellate panel. *Id.*

The Receiver petitioned the Court of Appeals for an initial hearing *en banc* with respect to the time bar issue; the Court of Appeals denied the Receiver's request. By its decision issued September 18, 2002, the First Circuit Court of Appeals affirmed the decision of the District Court. *See* Pet. App. 1a-21a. On the issue of priority of guaranty fund claims, the Court of Appeals affirmed the District Court's holding that the priority served to protect policyholders by providing prompt and certain payment of policyholder claims. *See* Pet. App. 11a-15a. With respect to the issue of the time bar, however, the Court of Appeals held that it was bound by *Garcia* and that such precedent could be overturned only by the Court of Appeals sitting *en banc*. *See* Pet. App. 16a. The Court of Appeals further explained that *Fabe* requires state statutes to focus protection on policyholder claims, whether directly or indirectly (where the connection is strong), in order to invoke McCarran-Ferguson protection. *See* Pet. App. 17a. The Court of Appeals concluded that application of the bar date to United States claims would have "only a limited effect on policyholders – who have priority anyway – and [would] equally or primarily help[] other general creditors". *Id.*

Both the Receiver and the Guaranty Funds petitioned the Court of Appeals for a panel rehearing and a rehearing *en banc*. The Receiver's petition was

denied on October 31, 2002, and the Guaranty Funds' petition was denied on November 19, 2002.

REASONS FOR GRANTING THE PETITION

In *Garcia* and now in this case, the First Circuit Court of Appeals has misapplied the principles established by this Court in *United States Dep't. of Treasury v. Fabe*, 508 U.S. 491 (1993), by finding that a claims bar provision in a state statutory insurer liquidation scheme does not regulate the "business of insurance" and thus is not afforded reverse preemption under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011, *et seq.*, Pet. App. 61a-62a. Moreover, *Garcia* and this case conflict with the decisions of other circuits that have considered McCarran-Ferguson reverse preemption post-*Fabe*. The uncontradicted factual record before the Court of Appeals in this case demonstrates that liquidating distributions on policyholder claims are blocked by the United States' claimed exemption from the Massachusetts time bar and that any effect on other claimants is merely hypothetical given the limited amount of estate assets available for distribution. This Court should consider the time bar issue in order to resolve the legal inconsistency created by the First Circuit's decisions and to address an issue of significant practical importance to policyholders nationwide.

I. The First Circuit Misapplied the Principles Set Forth by This Court in *Fabe*.

In *Fabe*, this Court held that a statute regulates the "business of insurance" in the context of the McCarran-Ferguson Act when the statute directly or indirectly protects the relationship between the insurer and the insured. *Fabe*, 508 U.S. at 501 (citing *SEC v. Nat'l. Securities, Inc.*, 393 U.S. 453, 460

(1969)). This Court went on to state that: "There can be no doubt that the *actual performance of an insurance contract* falls within "the business of insurance". . .. *Id.* at 503 (emphasis added). At issue in *Fabe* was an Ohio statute that, in part, prioritized the payment of administrative costs and the claims of policyholders over claims of the United States. Finding that such priority facilitated the payment of policyholders, i.e. the crux of the relationship between the insurer and the insured, this Court held that such portion of the priority statute was intended to regulate the business of insurance and thus was afforded reverse preemption of the Federal Priority Act.

Likewise, the Massachusetts claims bar date at issue here ensures the actual performance of the insurance contract because, without such bar date, absent a waiver by the United States, no receiver could wind-up insurer liquidation proceedings, and policyholder claims will be left unpaid. Despite its discussion of *Fabe*, however, the First Circuit maintained that its holding was compelled by its prior decision in *Garcia*, which held that a time bar in insurer liquidation proceedings could not be applied to the United States because "it [was] neither directed at, nor necessary for, the protection of policyholders." This conclusion is contradicted by the undisputed record in this case. The First Circuit's statement that the bar date for United States claims would have only a "limited effect" on policyholders "*who have priority anyway*" exemplifies the First Circuit's misapprehension of the undisputed facts of insurer liquidation proceedings presented by the record in this case.

If the United States, whether as a policyholder or a general creditor, is granted an open-ended filing period, then the priority of policyholders is rendered virtually immaterial or, at a minimum, is substantially devalued because no distributions will be made, and the liquidation proceedings will remain in liquidation

purgatory. *See* Pet. App. 70a, at ¶ 70a. The First Circuit's conclusion that the Commissioner "cannot ever pay off creditors with lower priorities", absent a waiver from the United States, implies that the Court believed that claimants with priorities higher than or equal to those of the United States can be paid off, notwithstanding the federal exemption from the time bar. In actuality, however, an exemption from the bar date permits the United States to file policyholder and general creditor claims at any time, leaving the Commissioner unable to predict with certainty whether and when federal claims will be filed. Under the threat of personal liability, a Receiver will refrain from making distributions absent a waiver from the United States, the lack of which has resulted in insurer liquidations remaining open for decades without resolution. *See* Pet. App. 66a & 72a, at ¶¶ 13 & 24. Likewise in this case, no policyholder has been paid by the Receiver, and the insolvency proceeding remains on hold indefinitely at the mercy of the United States. Moreover, the reality of the American Mutual liquidation, as with most insurer liquidations, is that the estate assets are only sufficient to pay policyholder claims, which in conjunction with claims filed by guaranty funds in their stead constitute the majority of claims filed, Pet. App. 73a, at ¶ 27, further bolstering the point that *policyholders* are the persons primarily affected by the time bar, not general creditors.

Since *Fabe*, the First Circuit has recognized the vital role played by a time bar and its importance to policyholders. *See Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciente*, 125 F.3d 9, 17 (1st Cir. 1997) ("If the Insurance Commissioner were required to accept claims against the liquidated [insurer] indefinitely that would clearly contravene the legitimate legislative goal of finality, and could well delay distribution of funds to any claimant."). Indeed, other courts have addressed the exact issue before the

First Circuit, finding that *Fabe* requires a broader understanding of the provisions intended to protect policyholders than that reflected in *Garcia*. *See Boozell v. United States*, 979 F. Supp. 670, 675 fn. 3, 677-79 (N.D. Ill. 1997) (rejecting *Garcia*'s "narrow reading of *Fabe*" and upholding state time bar because it "directly or indirectly assists policyholders"); *Clark v. Blue Cross Blue Shield of West Virginia, Inc.*, 510 S.E. 2d 764, 785-86 (W.Va. 1998) (rejecting narrow approach of *Garcia* and upholding subordination of late-filed claims because it protects claims of policyholders; "the fact that claim holders other than policyholders may also benefit from the enforcement of the timely-claim date and associated claim diminution is immaterial"). Nevertheless, the First Circuit's decisions in *Ruthardt* and *Garcia* drastically depart from the *Fabe* principle that a provision that primarily protects policyholders is one that regulates the business of insurance.

The First Circuit's focus on the concomitant benefit to general creditors is misplaced. The fact that creditors in addition to policyholders may benefit from a provision does not preclude the finding that a provision regulates the business of insurance under *Fabe*. This Court in *Fabe* qualified its holding by stating that to the extent the priority statute was designed to benefit creditors other than policyholders, it was not a law enacted for the purpose of regulating the business of insurance. *See Fabe*, 508 U.S. at 508-09. The Court went on to say that the fact that any law could be said to redound to the benefit of policyholders in some way was not enough to establish that the law was enacted for the purpose of protecting policyholders and thus regulating the business of insurance. *Id.* The converse, however – that a law does *not* "regulate the business of insurance" because it can be said to redound to the benefit of non-policyholders – is not true, *provided the statute is reasonably necessary to further the goal of*

protecting policyholders. Id. at 509. Thus, the preference for policyholders and the preference for administrative expenses (which benefit all creditors) were upheld in *Fabe.* Indeed, the First Circuit reiterated this point when it reasoned that any benefit to the insurance industry derived from the priority of guaranty funds is irrelevant because the priority "primarily provides adequate resources for a payment scheme whose central mission is to achieve prompt payment for policyholders of what their insurance policies promised them". *See* Pet. App. 13a. Nevertheless, while the First Circuit recognized and applied this principle in its analysis of the priority provision, it rejected the same principle in its analysis of the bar date, resulting in the decision of which the Guaranty Funds now seek review.

II. The First Circuit's Misapplication of *Fabe* is Underscored by Post-*Fabe* McCarran-Ferguson Decisions of the Second, Fifth and Tenth Circuits.

The First Circuit's decisions on the time bar issue conflict with decisions of the United States Courts of Appeals for the Second, Fifth, and Tenth Circuits. *Garcia* and now *Ruthardt* stand alone in their reading of *Fabe*, while decisions such as *Stephens v. American Intern Ins. Co.*, 66 F.3d 41 (2nd Cir. 1995); *Munich Am. Reins. Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998), *cert. denied*, 525 U.S. 1016 (1998); and *Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277 (10th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999), demonstrate a proper interpretation of this Court's decision in *Fabe.*

The Second Circuit in *Stephens v. American Intern Ins. Co.*, 66 F.3d 41 (2nd Cir. 1995), held that the Kentucky anti-arbitration provision in the state's insurer liquidation scheme reverse preempted the

Federal Arbitration Act. Citing *Fabe*, the Second Circuit concluded that the state anti-arbitration statute "regulated the business of insurance" because it had the "end, intention, or aim of adjusting, managing or controlling the business of insurance" by regulating the winding up of an insolvent insurer. *Id.* at 45. Again citing *Fabe*, the Second Circuit concluded that the anti-arbitration provision protected the interest of policyholders because it ensured that the liquidation would be both orderly and predictable. *Id.*

The Fifth and Tenth Circuits have also considered the reach of the Federal Arbitration Act under the gloss of *Fabe*. In *Munich Am. Reins. Co. v. Crawford*, 141 F.3d 585, 593-94 (5th Cir. 1998), *cert. denied*, 525 U.S. 1016 (1998), the Fifth Circuit concluded that the Oklahoma provision vesting exclusive jurisdiction in a state court over insurer liquidation proceedings was "aimed at protecting the relationship between the insurance company and its policyholders" because it affected the orderly adjudication of claims and conserved resources of the insolvent insurer for ultimate payment of claims of policyholders and other creditors. Accordingly, the Fifth Circuit concluded that the state provision reverse preempted the Federal Arbitration Act. Similarly, in *Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277, 1281 (10th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999), the Tenth Circuit concluded that a Utah statute authorizing a stay of all claims upon entry of a state court insurer liquidation order was enacted for the purpose of regulating the business of insurance and thus reverse preempted the Federal Arbitration Act. The Tenth Circuit reasoned that the statute would serve to achieve consistent rulings, equal treatment of claimants, and conservation of resources of the insolvent insurer, ultimately protecting the interest of policyholders.

The reasoning applied by the Second, Fifth, and Tenth Circuits should have been applied by the First Circuit to yield a similar result. Like the provisions in *Stephens*, *Munich*, and *Davister*, the claims bar provision at issue here is aimed at the prompt and orderly payment of claims, which are primarily and almost exclusively direct or assigned claims of policyholders, including those of guaranty funds. Not only is the level of expenditure of estate resources reduced by protecting against an unnecessarily protracted proceeding, but the claims bar provision ensures that liquidating distributions will actually occur, a result that is not otherwise guaranteed under the scenario contemplated by the United States and approved by the First Circuit.

The decisions of the Fifth and Tenth Circuits in *Munich* and *Davister*, respectively, further demonstrate that a law regulating or protecting policyholders which may also benefit other creditors does not preclude protection by the McCarran-Ferguson Act. *See Munich*, 141 F.3d at 594 ("These laws are reasonably necessary to further the goal of protecting policyholders, even though they may also benefit other creditors."); *Davister*, 152 F.3d at 1281 ("By offering benefits to other creditors, that ultimate purpose [to protect policyholders] is neither diminished nor denigrated"). Their approach echoes that set forth in *Fabe*. *See Fabe*, 508 U.S. at 508-09 (recognizing that statute may benefit both policyholders and other creditors and still receive McCarran-Ferguson protection; requiring that court determine whether provision is "reasonably necessary to further the goal of protecting policyholders"). In order to maintain consistency with this Court's holding in *Fabe*, as it has been properly applied in other Circuits, this Court should now consider the First Circuit's ruling on the time bar provision and recognize that the time bar provision indeed regulates

the business of insurance and should thus be applicable to the United States.

III. The First Circuit's Decision is Inconsistent With Pre- and Post-*Fabe* McCarran-Ferguson Decisions of This Court.

In its post-*Fabe* consideration of McCarran-Ferguson reverse preemption, this Court has embraced principles that support the Guaranty Funds' reading of *Fabe* and not that of the First Circuit in *Garcia* and now *Ruthardt*. For example, in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999), a unanimous decision, the Court analyzed the second prong of the McCarran-Ferguson Act, *i.e.*, whether a federal statute would "invalidate, impair, or supersede" a state law of insurance. Recognizing that the issue here relates to the *Fabe* analysis of the first prong, *i.e.*, whether a state statute regulates the business of insurance, *Humana* nonetheless is instructive in its approach. The *Humana* court rejected "polar opposite" views that the field of insurance was ceded to the states absent express statement by Congress and that Congress intended federal regulation in the absence of a head-on collision with state law. Instead, the Court established a balanced approach requiring courts to determine whether "federal law is applied in aid or enhancement of state regulation, and does not frustrate any state policy or disturb the State's administrative regime." Requiring a close review of the ultimate effects of a law and the policy behind it, such an approach is akin to the approaches taken by the Second, Fifth, and Tenth Circuits and by that advocated by the Court's decision in *Fabe*. Such approach was not followed by the First Circuit.

As another example, in *UNUM Life Ins. Co. v. Ward*, 526 U.S. 358, 368 (1999), this Court held that

California's notice-prejudice law regulated the business of insurance, rejecting the argument that the provision is "merely an industry-specific application of [a] general principle". Instead, this Court found that the notice-prejudice rule derived from the specific context of insurance and was not simply a consequence of the principled discretion of courts, irrespective of the nature of matters before them. *Id.* at 371. This Court identified policy concerns specific to the insurance industry, *e.g.*, the public interest in compensating injured insured parties and balancing burdens of both the insurer and the insured, as crucial underpinnings for this Court's holding that the notice-prejudice rule is for the purpose of "regulating the business of insurance". *Id.* at 372. The same policy concerns at issue in *UNUM* are at issue here. Likewise, the claims bar provision is not simply a general statute of limitations but rather a law specifically directed at the liquidation of insurers with the aim of ensuring payment of policyholder claims, thus enforcing the insurance contracts of the insolvent insurer. Without the time bar provision specific to insurer liquidation proceedings, insured parties will go uncompensated and the claimed priority of one potential creditor – the United States – will be unfairly borne by all policyholders and the guaranty funds created to protect policyholders.

The First Circuit's observation that this Court has consistently applied a narrow interpretation of the "business of insurance" provision in the McCarran-Ferguson Act is overstated and unavailing as support of the First Circuit's decision on the time bar. *See* Pet. App. 8a-9a (referring to this Court's pre-*Fabe* decisions in *Group Life & Health Ins. Co. v. Royal Drug*, 440 U.S. 205 (1979) and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982)). Guided by principles of statutory interpretation, this Court, of course, has cautiously parsed the language of the McCarran-Ferguson Act. However, this Court has recognized

that the McCarran-Ferguson Act was enacted for multiple purposes, and that therefore the repeated phrase "business of insurance" takes on a meaning of varied breadth depending upon the purpose to which it is aimed. *See Fabe*, 508 U.S. at 504-05. As a result, in evaluating whether a provision is enacted for the purpose of regulating the "business of insurance", this Court has interpreted the phrase more broadly against the backdrop of the purpose of federalism, *e.g.* in *Fabe*, than it has against that of antitrust exemption, *e.g.* in *Royal Drug* and *Pireno*. Id. Nevertheless, even applying the reasoning of cases such as *Royal Drug* and *Pireno*, as this Court did in *Fabe*, in which cases the phrase "business of insurance" arguably has been interpreted more narrowly, the proper analysis dictates a conclusion that a provision that is integrally related to the relationship between the insurer and insured and the ultimate transfer of risk is a provision that "regulates the business of insurance". *See Fabe*, 508 U.S. at 503 (applying arguably more narrow holdings of *Royal Drug* and *Pireno* and finding that without performance of contract there is no transfer of risk). The claims bar provision is such a provision. Without a bar date, performance of the insurance contract will not occur because policy claims will not be paid. Whether applying the "narrow" holdings of *Royal Drug* and *Pireno* or the "more broad" approach of *Fabe* and its progeny, the claims bar provision "regulates the business of insurance" and should thus be applied to the United States.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 28, 2003

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APPENDIX A

LINDA RUTHARDT, in her official capacity as Commissioner of Insurance of the Commonwealth of Massachusetts and Permanent Receiver of American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston, Plaintiff,

v.

UNITED STATES of America and John Ashcroft, in his official capacity as Attorney General of the United States, Defendants, Appellees.

Alabama Insurance Guaranty Association, et al., Movants, Appellants.

Linda Ruthardt, in her official capacity as Commissioner of Insurance of the Commonwealth of Massachusetts and Permanent Receiver of American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston, Plaintiff, Appellant/Cross-Appellee,

v.

United States of America and John Ashcroft, in his official capacity as Attorney General of the United States, Defendants, Appellees/Cross-Appellants.

Alabama Insurance Guaranty Association, et al., Movants.

Nos. 01-2553, 01-2587 and 01-2668.

United States Court of Appeals,
First Circuit.

Heard July 30, 2002.

Decided Sept. 18, 2002.

Joseph C. Tanski with whom Alan J. Cooke, David B. Mack and Hutchins, Wheeler & Dittmar, P.C. were on brief for movants, appellants.

Kathleen A. Kane, Appellate Staff, Civil Division, Department of Justice, with whom Robert D. McCallum, Jr., Assistant Attorney General, Michael J. Sullivan, United States Attorney, and Robert M. Loeb, Appellate Staff, Civil Division, Department of Justice, were on brief for defendants, appellees.

Thomas A. Barnico, Assistant Attorney General, Government Bureau, with whom Thomas F. Reilly, Attorney General, J. David Leslie and Eric A. Smith, Special Assistant Attorneys General, Rackemann, Sawyer & Brewster were on brief for plaintiff, appellant/cross-appellee.

Joseph C. Tanski, Alan J. Cooke, David B. Mack and Hutchins, Wheeler & Dittmar, P.C. on brief for Insurance Guaranty Funds, Amicus Curiae.

Rowe W. Snider, Steven T. Whitmer and Lord Bissell & Brook on brief for National Conference of Insurance Guaranty Funds, Amicus Curiae.

Joel A. Glover, Franklin D. O'Loughlin, Rothgerber Johnson & Lyons LLP, Joseph F. Ryan and Lyne Woodworth & Evarts LLP on brief for National Organization of Life and Health Insurance Guaranty Associations, Amicus Curiae.

Kathleen A. Kane, Appellate Staff, Civil Division, Department of Justice, with whom Robert D. McCallum, Jr., Assistant Attorney General, Michael J.

Sullivan, United States Attorney, and Robert M. Loeb, Appellate Staff, Civil Division, Department of Justice, were on brief for defendants, appellees/cross-appellants.

Before BOUDIN, Chief Judge, SELYA, Circuit Judge and GREENBERG,* Senior Circuit Judge.

BOUDIN, Chief Judge.

On these appeals, plaintiff the Massachusetts Commissioner of Insurance ("the Commissioner") argues that—under the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (2000)—two provisions of state law govern claims by the United States in a state insurance company liquidation proceeding. The district court said yes as to one issue (claims priority) and no as to the other (bar date). We agree.

On March 9, 1989, a Massachusetts state court determined that two Massachusetts insurance companies (collectively, "American Mutual") were insolvent. The court then appointed the Commissioner as permanent receiver to conduct their liquidation. On March 22, 1989, in accordance with state law, the court entered an order requiring all creditors of American Mutual to file proofs of claim with the receiver within one year of the liquidation date (*i.e.*, by March 9, 1990). *See* Mass. Gen. Laws ch. 175, § 180F (2000); *In re Liquidation of Am. Mut. Liab. Ins. Co.*, 434 Mass. 272, 747 N.E.2d 1215, 1219 (Mass. 2001).

Agencies of the United States eventually filed claims against the two insurance companies totaling over $640,000. Some of the claims were filed after the one-year deadline; these late-filed claims comprised

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* Of the Third Circuit, sitting by designation.

$140 claimed by the late Interstate Commerce Commission and $69,865 claimed by Medicare contractors. The United States has asserted throughout that all of its claims are entitled to priority over claims of the so-called "guaranty funds" and that the one-year bar date does not apply to any of its claims.

Virtually all states have set up insurance guaranty funds to protect policyholders if and when insurance companies go bankrupt. Although the extent of coverage varies, in general covered claims by policyholders against an insolvent insurer are paid by the fund. The fund in turn acquires and can enforce (the legal phrase is "subrogated to") the insured's claim against the insurer assets held by the receiver. *See, e.g.*, Mass. Gen. Laws ch. 175D, § 8(1) (2000). American Mutual did business in a number of states, and payments (as of September 2000) by guaranty funds in 46 jurisdictions to policyholders of American Mutual totaled over $650 million.

After making a number of partial payments to the guaranty funds—which are the largest creditors in the liquidation—the Commissioner on May 14, 1999, filed a liquidation plan in state court. The plan proposes to distribute remaining American Mutual assets as provided under Massachusetts law: pertinently, first priority is for administrative claims; second, for policyholder claims including subrogated claims made by guaranty funds; third, for unearned premiums; and fourth, for non-policyholder claims of the United States. Mass. Gen. Laws ch. 175, § 180F.

The American Mutual assets held by the receiver do not suffice to cover all claims. The United States, which had consented to earlier distributions, insisted that as a matter of federal law its priority trumped that of the guaranty funds and also that the

one-year bar date could not be applied to its late-filed claims. In response, the Commissioner, who can be held personally liable under federal law for ignoring proper claims of the United States, 31 U.S.C. § 3713(b) (2000), brought the present declaratory judgment action in the district court to settle the two issues.

Various guaranty funds from Massachusetts and other jurisdictions[1] sought to intervene; the district court denied them intervenor status but allowed them to file amicus briefs. On cross motions for summary judgment, the district court determined that, by "reverse preemption," the McCarran-Ferguson Act allowed state law to override otherwise applicable federal law, thus according the guaranty funds priority over the United States as to subrogated policyholder claims. *Ruthardt v. United States*, 164 F. Supp. 2d 232, 241 (D. Mass. 2001). Conversely, relying on a prior decision of this court, the district court held that the United States was not bound by Massachusetts law's one-year requirement for filing claims. *Id.* at 244-45.

The United States now appeals to contest the priority ruling. The Commissioner cross-appeals as to the time bar ruling. The guaranty funds appeal from the denial of intervention. For reasons that will become apparent, the important open issue on these appeals, which is subject to *de novo* review, *Euromotion, Inc. v. BMW of N. Am., Inc.*, 136 F.3d 866, 869 (1st Cir. 1998), concerns the United States' claim to priority over the guaranty funds.

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[1] The states represented by the guaranty funds are Alabama, California, Connecticut, the District of Columbia, Illinois, Louisiana, Maine, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, and Virginia.

Claims Priority. The priority issue is framed by several statutes. The first is the Federal Priority Act, 31 U.S.C. § 3713 (2000), which gives first priority ("shall be paid first") to the United States for its claims against, *inter alia*, an insolvent entity's estate. By express qualification, this provision does not apply to Bankruptcy Code proceedings, *id.* § 3713(a)(2), but this qualification does not extend to state proceedings to liquidate insurance companies.

Instead, to preserve state priorities, the Commissioner relies upon the McCarran-Ferguson Act, which as amended provides as follows (the critical language is underscored):

> Section 1. Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> Section 2.
> (a) State regulation
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation
>
> *No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance*, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance:

> Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

15 U.S.C. §§ 1011-12 (emphasis added).

The statute's origins are familiar. In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), the Supreme Court held that insurance, hitherto regulated by the states as a local activity, fell within the Commerce Clause and was therefore subject to federal antitrust regulation. Congress responded with the McCarran-Ferguson Act. The provision of primary interest here—the underscored language of section 2(b)—immunizes against federal statutory preemption those state statutes enacted "for the purpose of regulating the business of insurance."[2]

Unsurprisingly, the Commissioner argues that the quoted language embraces the Massachusetts priority statute insofar as it prefers the claims of guaranty funds arising out of their payments to

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[2] Section 2(a) of the statute effectively safeguards state insurance regulation against preemption through the dormant Commerce Clause doctrine. In section 2(b), Congress intended to protect state regulation against federal statutory preemption, but it added two limitations: state regulation is not protected where Congress enacts a statute that "specifically relates to the business of insurance"; and, in addition, the federal antitrust laws apply to insurance companies "to the extent that [the business of insurance] is not regulated by State Law." Neither limitation is at issue here.

policyholders. Put differently, the Commissioner says that the quoted language means that the Federal Priority Act does not "supercede" this facet of the priority statute. In shorthand, this can be called "reverse preemption"—of federal law by state law—by Congress' consent.

If the McCarran-Ferguson Act were read in lay terms, the Commissioner would easily prevail. In ordinary usage, the liquidation of American Mutual was surely part of the state's regulation of the insurance business; and, as we will see, the Massachusetts statute according priority (over the United States) to guaranty funds for their subrogated claims is part of a scheme directed to protecting policyholders by assuring prompt and full payment of covered claims. But the Supreme Court has read the exemption more narrowly than literally, making this an extremely close case.

Suffice it to say that the narrowing has been based in part on legislative history and in part on policy concerns. One special policy concern relates to a desire to assure antitrust enforcement; but even when antitrust is not at issue the Court has in general read "business of insurance" restrictively, focusing on the insurance contract and the protection of policyholders. *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982). Other insurance-related regulation or activities have also been deemed outside the protection of the McCarran-Ferguson Act. The leading cases include *Pireno, Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979), *SEC v. National Securities, Inc.*, 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969), and *United*

States Department of Treasury v. Fabe, 508 U.S. 491, 113 S.Ct. 2202, 124 L.E.2d 449 (1993).[3]

Fabe dealt directly with the question whether the Federal Priority Act superceded a state statute governing priorities in insurance company liquidation. There, the Ohio statute in question assigned all government claims a lower priority than, *inter alia*, administration expenses, employee claims for wages due, policyholder claims, and the claims of non-governmental creditors. By a five-to-four vote, the Supreme Court upheld the priority for policyholders and for administrative expenses, the latter on the ground that they were essential for the liquidation and therefore for policyholders' receipt of payments. *Fabe*, 508 U.S. at 493, 508-09, 113 S.Ct. 2202.

But so far as the Ohio statute gave priority to employee and general creditor claims, *Fabe* held that the McCarran-Ferguson Act did not protect the statute "because their [the employee and creditor claims] connection to the ultimate aim of insurance [was] too tenuous," 508 U.S. at 509, 113 S.Ct. 2202; and accordingly, the Federal Priority Act did give the United States priority ahead of those two classes. Four dissenting justices thought that the liquidation statute in its entirety failed to qualify as regulation of the business of insurance and that the United States had priority over all claims. *Id.* at 517, 113 S.Ct. 2202 (Kennedy, J., dissenting).

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[3] *Pireno*, 458 U.S. at 130, 102 S.Ct. 3002 (use of peer review committee to assess reasonableness of chiropractic services not part of the business of insurance); *Royal Drug Co.*, 440 U.S. at 213-14, 99 S.Ct. 1067 (insurer's agreement with participating pharmacies to provide benefits to policyholders not part of the business of insurance); *Nat'l Sec.*, 393 U.S. at 460, 89 S.Ct. 564 (state law regulating merger of insurers not part of the business of insurance). *Fabe* is discussed immediately below.

If and when the next case reaches the Supreme Court, the dissenting position in *Fabe* could prevail. That position may be closer to the mainstream of prior Court cases on the McCarran-Ferguson Act and, anyway, all four *Fabe* dissenters still sit while two of the *Fabe* majority have left the bench. But for now the premises of the *Fabe* majority govern lower courts, *see State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) ("[I]t is this [Supreme] Court's prerogative alone to overrule one of its precedents."), so for us the only question is where those premises lead. Unfortunately, answering that question is difficult because our own case is very close to *Fabe* but arguably a small step beyond.

Prior to *Fabe*, the touchstone of McCarran-Ferguson protection was the insurer-insured contract. *Fabe* deemed the Ohio liquidation provisions, so far as they gave priority for payment to policyholders out of the defunct insurer's assets, to be close enough to enforcement of the original contract to qualify for McCarran-Ferguson protection. The Court also upheld a priority for administrative expenses as necessary to assure policyholder payments, but held invalid (as against the Federal Priority Act) the state priority for payments for past wages of company employees and payments to creditors other than policyholders.

Strictly speaking, the priority that Massachusetts gives to guaranty funds is not absolutely "necessary"—from a short-term perspective—to assure payment by the funds to policyholders. If the "necessity" test were met, then *Fabe* would clearly resolve the matter in favor of the Commissioner. But the obligations of the guaranty funds to pay covered policy claims exists whether or not the guaranty funds are then reimbursed; direct assessments against the insurers will be increased to cover the gap. Similarly, the state priority for guaranty

funds gives the funds, not policyholders, a priority over the United States. To this extent, the guaranty funds might appear to resemble general creditors who under *Fabe* did not get priority over the United States.

This perspective is too narrow. *Fabe*'s premise was not that priority (over the United States) for policyholders is all right and priority for anyone else is not; *Fabe* itself upheld a priority for administrative expenses of liquidation (and apparently for administrative expenses of guaranty funds, too, *see* 508 U.S. at 495 n.2, 113 S.Ct. 2202) *because* these reimbursements facilitated payment to policyholders. In other words, priorities that indirectly assure that policyholders get what they were promised can also trigger McCarran-Ferguson protection; the question is one of degree, not of kind. *See id.* at 509, 113 S.Ct. 2202 (upholding administrative expenses as "reasonably necessary" and striking down general creditor claims as "too tenuous[ly]" connected).

The priority that Massachusetts affords to guaranty funds is part and parcel of an integrated regime aimed at the protection of policyholders. Reimbursements to the funds are a significant source of revenue for making covered payments to policyholders; for example, as of September 15, 2000, such payments to the guaranty funds financed approximately forty-six percent of the payments to policyholders in the American Mutual liquidation. Without the priority for such reimbursements, payments to policyholders could in practice be less secure and would at the very least be delayed in some instances. Prompt payment is one of the main benefits of guaranty funds.

That policyholders benefit from a state regulation is not automatically enough to assure it McCarran-Ferguson protection. Merely reducing

insurer costs (through low cost purchasing or peer review schemes) may benefit policyholders in the long run, but the connection may be too remote. *See, e.g., Pireno*, 458 U.S. at 130, 102 S.Ct. 3002; *Royal Drug*, 440 U.S. at 213-14, 99 S.Ct. 1067. But, as already noted, the issue is one of directness and degree. Here, we are concerned with funding payment of promised benefits to policyholders, and payment of benefit to policyholders is just what *Fabe* said is within the general ambit of the McCarran-Ferguson Act.

The United States concedes that, under *Fabe*, the policyholders have priority over its own claims. Yet the guaranty funds are little more than a mechanism for advancing the money to pay policyholders promptly and then recovering those advances out of the estate assets, ahead of the United States, just as the policyholders could have done directly. If the state statutes had described the fund payments as merely loans, conditioned on the policyholders advancing their own priority claims to repay the loans, the United States would lose.

It thus becomes apparent that the United States is using the Federal Priority Act not to maintain its priority but to enlarge it. If the policyholder makes a direct claim against the estate, that claim is satisfied out of estate assets *ahead* of the United States. If (for speed and certainty) the policyholder is instead paid by the guaranty fund, and the guaranty fund then seeks to recoup, the United States' position in this case would mean that the same assets of the estate are subject to a priority claim of the United States. This would be a perverse result.

Of course, if Congress directed such a result, it would be the job of courts to enforce it. But the interplay of the Federal Priority Act and the McCarran-Ferguson Act is assuredly something about which

Congress thought little. The ironing of such wrinkles, as with many such statutes, has been left to the courts. *Fabe*, which is just such a judicial construct, may not literally dictate the outcome here; but, all things considered, upholding the priority of the funds is consistent with the logic and spirit of *Fabe*.

The United States makes three arguments for an outcome in its favor. The best grounded is its claim that the state priority for guaranty funds does not easily satisfy the Supreme Court's pre-*Fabe* criteria for identifying the "business of insurance"; in particular, the state priority does not directly regulate the insurance contract between insurer and insured, previously invoked by the Court as a touchstone. That is so, but that was equally true of *Fabe*'s priority for administrative expenses and perhaps even its priority for policyholder claims against the defunct insurer. If such priorities were close enough in *Fabe* to satisfy the old criteria, they have to be close enough for us.

The second argument is that whether the fund is repaid ahead of the United States has nothing to do with protecting policyholders but is simply a benefit for the insurance industry. This is at most a half truth, and the half that is true does not matter. Yes, the industry will be better off if the funds have a priority since direct assessments against the industry will be less. But the priority for the funds primarily provides adequate resources for a payment scheme whose central mission is to achieve prompt payment for policyholders of what their insurance policies promised them.

The final argument, admittedly inventive, is that some policyholders will be worse off if the guaranty funds get their state-law priority: if the funds' state law priority is upheld, they will compete for estate assets with policyholder claims that are not

covered by fund protection;[4] but, if the priority is struck down, those same assets (after liquidation expenses) will all be available first for uncovered policyholder claims, after which the United States will come in ahead of the guaranty funds. Not amused by this attempt of the United States to pose as a friend of the policyholders, the district court called this argument "specious." *Ruthardt*, 164 F. Supp. 2d at 240.

It is not quite that. The district court's point was that "[i]n the absence of guaranty funds," the policyholders' covered claims would compete with uncovered claims for the same estate assets; substituting the guaranty funds' claims for the policyholder claims paid off by guaranty funds leaves the uncovered policyholder claims with exactly the same assets to divide—and, in addition, gives the covered claims the benefit of speedy and assured payment which would not exist without the guaranty fund scheme. This is all true but it rests on the district court's own "in the absence" predicate.

The argument of the United States depends not on looking at the scheme as a whole (and contrasting its absence) but with comparing the existing scheme, in the short run, first with and then without a priority for the funds. Even on this basis, it is not clear that matters would work out as the United States

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[4] In general, guaranty funds do not "guarantee" the payment of all claims. In Massachusetts, only certain "covered claims" are eligible for payment, and coverage is usually limited to a $300,000 cap except in the case of workers' compensation claims (where there is no cap). Mass. Gen. Laws ch. 175D, §§ 1(2), 5(1)(a) (2000). "Uncovered claims" therefore include both claims that are ineligible for guaranty fund protection in their entirety, and the portion of eligible claims that exceeds the dollar cap.

supposes.[5] In any event, the short-run perspective is inadequate: the guaranty fund scheme, which protects policyholders, is itself heavily dependent in a practical sense on priority reimbursement out of the estate assets. A clever argument cannot overcome this reality.

The time bar. This brings us to the second major issue in this case. As already explained, the United States filed a number of claims against the estate, some of which were filed after the one-year state deadline for claims in the liquidation proceeding. Regarding itself as bound by a prior First Circuit precedent, the district court held that this deadline was not binding on the United States. On cross appeal the Commissioner asks us to reexamine this precedent and to hold that the McCarran-Ferguson Act protects the one-year deadline.

A word of background will be helpful. The Supreme Court long ago held that (presumptively) claims of the United States as sovereign cannot be defeated by state statutes of limitations. *United States v. Summerlin*, 310 U.S. 414, 417, 60 S.Ct. 1019, 84 L.Ed. 1283 (1940). We say "presumptively" because Congress can provide otherwise. The Commissioner's position is that the McCarran-Ferguson Act does make the Massachusetts deadline apply to claims of the United States because that deadline, like the priority provision protecting guaranty funds, is "for the purpose of regulating the business of insurance."

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[5] If the intended priority for guaranty funds over the United States were forbidden, a Massachusetts court might well read state law to treat subrogated claims by the funds as claims of the policyholder: a departure from the wording of the statute but true to its aim. The United States would then have to argue that this recasting of claims also violates the Federal Priority Act—a hurdle it might or might not be able to leap.

This is certainly so in the lay sense of the phrase but, in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993), we held that it was not so in the specialized sense that the phrase is used in the McCarran-Ferguson Act, even with the gloss of *Fabe*. Dealing with a counterpart deadline—*Garcia* involved a Puerto Rico statute governing insurance company liquidations—then-Chief Judge Breyer ruled that the deadline was "neither directed at, nor necessary for, the protection of policyholders . . . . The provision helps policyholders only to the extent that (and in the same way as) it helps all creditors." *Id.* at 62.

We are bound by *Garcia* which can be overturned only by this court sitting en banc. *United States v. Wogan*, 938 F.2d 1446, 1449 (1st Cir.), *cert. denied*, 502 U.S. 969, 112 S.Ct. 441, 116 L.Ed.2d 460 (1991). The Commissioner argues—perhaps overargues—that a few courts elsewhere have not agreed with *Garcia*,[6] but it would require more than that for the panel to overturn *Garcia*. *See Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 592 (1st Cir.), *cert. denied*, 516 U.S. 807, 116 S.Ct. 51, 133 L.Ed.2d 16 (1995). She also argues that we have *sub silentio* overturned *Garcia* by failing to cite it in other cases where it could have been invoked; but a review of the

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[6] The Commissioner primarily relies on *Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir.), *cert. denied*, 525 U.S. 1016, 119 S.Ct. 539, 142 L.Ed.2d 448 (1998); *Stephens v. American International Insurance Co.*, 66 F.3d 41 (2d Cir. 1995); *Boozell v. United States*, 979 F. Supp. 670 (N.D. Ill. 1997); *Clark v. Blue Cross Blue Shield of West Virginia, Inc.*, 510 S.E.2d 764 (W. Va. 1998). Of these, only *Clark*, *id.* at 785-86, and *Boozell*, 979 F. Supp. at 677-79, directly criticized *Garcia*. *Stephens* cited *Garcia* with apparent approval on a related point, 66 F.3d at 45, while *Crawford* merely noted a potential difference in approach between *Stephens* and *Garcia*, 141 F.3d at 592. In addition, *Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277, 1281 n.5 (10th Cir. 1998), also approvingly cited *Garcia*.

cases shows that in one instance only private claims were at issue and the other cases protected the claims of the United States on other grounds.[7]

Nevertheless, it is useful to say a word about *Garcia*, partly to stress that it is consistent with the view we take of *Fabe* in the present case. Conceptually, *Fabe* draws the line at state law that focuses protection on policyholder claims, either directly or indirectly (where the connection is strong, as with the priority for the subrogated claims). 508 U.S. at 508-09, 113 S.Ct. 2202. An early bar date for United States claims has only a limited effect on policyholders—who have priority anyway—and equally or primarily helps other general creditors.

Thus, *Garcia* correctly applied *Fabe*. The problem with letting the United States file late claims is not that this is at odds with the McCarran-Ferguson Act. Rather, giving the United States an open-ended exemption from deadlines is (in the liquidation context) simply terrible public policy and was almost certainly not the result of any considered judgment by Congress. Given the connection of the problem with the efficient conduct of judicial proceedings (*i.e.*, liquidation), we think it may be useful to Congress for us to explain briefly why the policy ought to be reconsidered.

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[7] *See Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciente*, 125 F.3d 9 (1st Cir. 1997) (upholding a Puerto Rican bar date with respect to *private* policyholders); *United States v. R.I. Insurers' Insolvency Fund*, 80 F.3d 616 (1st Cir. 1996) (holding that the Medicare Secondary Payer provision specifically related to insurance and trumped McCarran-Ferguson reverse preemption); *Villafane-Neriz v. FDIC*, 75 F.3d 727 (1st Cir. 1996) (holding that the federal statute drawn in question did not impair state law, thus avoiding McCarran-Ferguson reverse preemption).

Because of the Federal Priority Act, the defunct insurance company cannot be fully liquidated, and its assets fully distributed, until all claims of the United States are satisfied to the extent that remaining assets permit. If there is no deadline for United States' claims, the Commissioner--who is personally liable for ignoring the Federal Priority Act, 31 U.S.C. § 3713(b)—cannot ever pay off creditors with lower priorities, unless she can wrangle a waiver from the United States. No doubt the United States may give a waiver but here, even after a decade, a final waiver has not been provided. True, too, the United States is likely limited as to some of its claims by a patchwork of federal statutes of limitations; but they vary from claim to claim. *E.g.*, 28 U.S.C. § 2415 (2000) (general six-year statute of limitations for contract-based actions for money damages brought by the United States); 26 U.S.C. § 6501 (2000) (three-year statute of limitations on income taxes). In a complicated liquidation, understandably the Commissioner is loath to rely on such statutes—particularly because she does not know exactly what claims the United States has so far failed to discover and assert. Some uniform limit is plainly needed.

Congress could easily fix the problem, as it has already done for ordinary bankruptcies. 31 U.S.C. § 3713(a)(2) (excepting Title 11 from the Federal Priority Statute); 11 U.S.C. § 502(b)(9) (2000); Fed. R. Bankr. P. 3002(c)(1). But this is a matter for the legislature, not the courts. Among other reasons, the optimal answer might well be something other than letting each state fix its own quite short limit for federal claims. The United States, with its vast array of agencies and activities, might well deserve more than one year, *cf.* Fed R. App. P. 4(a)(1)(A), (B), but it does not need forever.

In our view, the two state and district court cases that do disagree with *Garcia* are not persuasive in their reasoning. *See Boozell*, 979 F. Supp. at 677-78; *Clark*, 510 S.E.2d at 785-86. Rather, they implicitly reflect the pressure created where the conduct of an already complicated state proceeding is further complicated by a seemingly unlimited in time (and therefore irrational) veto possessed by the United States. If the Department of Justice cannot find time to draft a proper amendment, it will simply encourage judicial self-help, however misguided that may be.

Intervention. Finally, we consider the questions raised by the would-be intervenors, a number of state guaranty funds who were denied intervention by the district court and now appeal from that ruling. Regardless of whether review might have been sought earlier, it is well settled that the final judgment brings up intermediate rulings such as rulings on intervention. *See, e.g., Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-77, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987) (noting the right of would-be intervenors to appeal from an adverse final judgment). We sustain the district court's rulings but permit intervention at this time and in this court on a going-forward basis.

The would-be intervenors unquestionably have an enormous practical stake in this case. The guaranty funds are liable, under their own state laws, to reimburse numerous policyholders of American Mutual who bought policies in their respective states. Similarly their priority in claiming Massachusetts assets of the estate depends on whether the Commissioner or the United States prevails on these appeals.

Thus, the would-be intervenors meet the first two requirements for intervention as of right: an

interest in the matter in controversy and a practical threat to that interest. Fed. R. Civ. P. 24(a)(2). The difficulty is the qualification: "unless the applicant's interest is adequately represented by existing parties." *Id.* The district court found that the interests of the guaranty funds were adequately represented by the Commissioner whose position on the priority and time bar issues is the same.

Adequacy is presumed, although rebuttably so, where a government agency is the representative party. *See Pub. Serv. Co. v. Patch*, 136 F.3d 197, 207 (1st Cir. 1998) (requiring a "strong affirmative showing" that the agency is not adequately representing the would-be intervenor's interests). The guaranty funds argue that the Commissioner is acting primarily in a private or personal capacity, given the threat of personal liability under the Federal Priority Act. But even if this were a pertinent distinction, which is open to doubt, it would not govern here: the Commissioner has a pertinent *governmental* interest in defending state statutes that benefit Massachusetts policyholders.

No concrete reason is suggested why the Commissioner's representation is inadequate and, in fact, the common position of the guaranty funds and the Commissioner has been ably presented. Thus, intervention as of right was properly denied. The district court could, of course, have permitted permissive intervention but its discretion on that score is great. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 113 (1st Cir. 1999). There is no basis for saying it was abused, especially where the issues were legal and amici briefs were permitted.

The would-be intervenors candidly admit that their present concern is with the future. Rehearing en

banc might be sought as to *Garcia* and the possibility exists of Supreme Court review. Given the magnitude of the stakes and the helpful advocacy the funds have provided to us, we choose in these unusual circumstances to exercise our own discretion to allow the guaranty funds to intervene in the case at this time on a going forward basis. *Cf. Daggett*, 172 F.3d at 112.

For the reasons stated, the decision of the district court is *affirmed*. The alternative request of the guaranty funds to intervene in this case is *granted* as of the release date of this decision. Each side shall bear its own costs in this court.
It is so ordered.

APPENDIX B

Linda RUTHARDT, in Her Official Capacity As Commissioner of Insurance of the Commonwealth of Massachusetts and Permanent Receiver of American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston, Plaintiff,

v.

UNITED STATES of America, and John Ashcroft in His Official Capacity as Attorney General of the United States, Defendants.

No. CIV. A. 00-12417-DPW.

United States District Court,
D. Massachusetts.

Sept. 27, 2001.

Thomas A. Barnico, Attorney General's Office, Eric A. Smith, J. David Leslie, Rackemann, Sawyer & Brewster, Boston, MA, for Plaintiff.

Barbara Healy Smith, U.S. Attorney's Office, Boston, MA, Bridget Niland, U.S. Department of Justice, Civil Division, Matthew J. Fader, U.S. Department of Justice, Washington, DC, for Defendants.

Joseph F. Ryan, Lyne, Woodworth & Evarts, Boston, MA, Franklin D. O'Loughlin, Joel A. Glover, Rothgerber Johnson & Lyons LLP, Denver, CO, for Amicus.

MEMORANDUM AND ORDER

WOODLOCK, District Judge.

The Massachusetts Commissioner of Insurance, who has been appointed under Massachusetts law to serve as the Permanent Receiver of two insolvent insurance companies (the "Receiver"), brings this declaratory judgment action seeking to establish that the general federal claim priority statute, 31 U.S.C. § 3713, does not preempt certain provisions of the Massachusetts statute governing the priority of claims for insurance liquidation proceedings, Mass. Gen. Laws ch. 175 §§ 180A-180L. Specifically, the Receiver requests a declaration (A) in Count II, that she may pay the claims of insurance guaranty funds prior to non-policyholder claims by the federal government and (B) in Count I, that federal government claims are subject to the March 9, 1990 filing deadline set by the state receivership court.

The parties[1] have filed dispositive motions[2] that turn upon the anti-preemption presumption of the

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[1] I have permitted a number of state insurance guaranty funds, who sought intervention in support of the Receiver, to participate in this litigation as amicus curiae. The National Organization of Life and Health Insurance Guaranty Associations was also granted leave to file an amicus brief. I will, however, decline the request of these guaranty funds for formal intervention before entry of judgment, for the reasons set forth in Section IV, *infra*.

[2] The Receiver has chosen to proceed by a motion for summary judgment, bringing to my attention certain factual matters, which do not appear to be disputed, beyond the pleadings. The United States, contending that the issues are essentially questions of law adequately framed by the complaint, has chosen to proceed by motion to dismiss. Because I have considered, with the knowledge of the parties, materials beyond

McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, which provides that

> No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b).

I. BACKGROUND

A. The Parties

American Mutual Liability Insurance Company ("AMLICO") and American Mutual Insurance Company of Boston ("AMI") (collectively "the Companies") are mutual insurance companies organized and existing under the laws of the Commonwealth of Massachusetts. The Companies primarily wrote workers' compensation, general liability, and automobile lines of insurance for both commercial and personal policyholders.

Linda Ruthardt is the Commissioner of Insurance for the Commonwealth of Massachusetts. In this capacity, she serves as the Permanent Receiver of the Companies.[3] As receiver, the Commissioner has exclusive authority to recover all assets of the Companies.

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the pleadings—including submissions by the proposed intervenors—I will dispose of this case by summary judgment.

[3] At the time the liquidation order was issued, Roger Singer was Commissioner of Insurance. When Linda Ruthardt was appointed Commissioner of Insurance, she was substituted as Receiver of the Companies by an order of the receivership court on September 3, 1993.

B. Guaranty Funds

Every state has an insurance guaranty fund to provide protection for insureds and claimants residing in that state in case of insurer insolvency. A guaranty fund is an association of all insurers licensed to transact business in the state of the guaranty fund.

In the event that an insurer becomes insolvent, guaranty funds become obligated to pay claims covered by the insurer's property and casualty insurance policies. Only covered claims are paid by guaranty funds; the funds do not pay non-policy claims or general creditor claims. The funds pay each covered claim up to the lesser of policy limits or a specified dollar cap (excepting workers' compensation claims, which are not capped). The dollar cap for most funds is $ 300,000.

In order to pay the claims of an insolvent insurer, each guaranty fund assesses its member insurers. Insurers recover assessments through higher insurance rates and premiums, and in certain states through premium tax offsets or policy surcharges.

Guaranty funds also may pursue recoveries against the estates of insolvent insurers, which reduces the need for assessments on member insurers and thus the need for increased rates and premiums. Any policyholder recovering from a guaranty fund is deemed to have assigned to the fund her right to recover from the insolvent insurer's assets, as well as the priority status she would have had without the guaranty fund. Massachusetts law provides that in a state liquidation proceeding, the claims of guaranty funds are afforded a priority equal to policyholders and ahead of non-policyholder claims by the United States government. Mass. Gen. Laws ch. 175 § 180F.

C. Factual History

On March 9, 1989, the Supreme Judicial Court for Suffolk County entered an order of liquidation declaring the Companies insolvent and placing them into receivership. The court appointed the Commissioner of Insurance as Permanent Receiver of the Companies.

As a result of the entry of the liquidation order, claims under the Companies' insurance policies with occurrence dates prior to December 31, 1987 were transferred to the Massachusetts Insurers Insolvency Fund ("MIIF") and other state guaranty funds. All claims under residual market policies and all Massachusetts automobile claims were transferred to guaranty funds regardless of the occurrence date. MIIF and other state guaranty funds have made payments on covered claims under the Companies' insurance policies totaling a reported $ 673,977,022.[4]

As authorized by Mass. Gen. Laws ch. 175 § 180F,[5] on March 22, 1989, the receivership court entered an order requiring the Companies' creditors to file their claims with the Receiver by March 9, 1990. Approximately 37,000 claims were filed by that date.[6] Various federal agencies submitted claims, both before

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[4] Altogether, fifty-one property-casualty guaranty funds in forty-six jurisdictions have sought reimbursement for payments made on covered claims under the Companies' insurance policies.

[5] Mass. Gen. Laws ch. 175 § 180F provides, in pertinent part, that all claims in any liquidation proceeding "shall be filed on or before the last date fixed by the court for the filing of claims in the domiciliary proceeding."

[6] Of these 37,000 claims, 7,167 were workers' compensation claims, 4,614 were claims under other types of policies, and 10,628 were claims for return of unearned premium on policies canceled because of the liquidation.

and after the March 9, 1990 bar date, totaling $ 636,742 against AMLICO and $ 5,740 against AMI.[7]

Pursuant to the Early Access Distribution Plan approved by the receivership court on June 22, 1993, four distributions totaling $ 173,971,732 have been made to eligible insurance guaranty funds in partial reimbursement of their claims against estate assets.[8] On June 1, 1999, the court approved a proposed fifth distribution of $ 10,125,000 to guaranty funds, but Ruthardt has not made the distribution because the United States has declined to waive its claims under 31 U.S.C. § 3713 with respect thereof.[9]

On May 14, 1999, Ruthardt filed a motion in the receivership court for approval of a liquidation plan reflecting the distribution priorities established by Mass. Gen. Laws ch. 175 § 180F and providing for

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[7] By letter dated February 21, 1990, the United States Department of Labor filed claims for $ 566,736.48 against AMLICO and $5,739.63 against AMI under the Longshore and Harbor Workers' Compensation Act. By letters dated August 21, 1990 and December 4, 1991, the United States Interstate Commerce Commission filed claims against AMLICO totaling $140 for certificates of insurance filed with the Commission. The Environmental Protection Agency filed a claim dated March 6, 1990 in its capacity as a creditor of Stanadyne, Inc., an AMLICO-insured company. Finally, commencing in 1993, various Medicare contractors submitted 45 claims totaling $69,865 relating to Medicare payments for former AMLICO employees or retirees.

[8] The guaranty funds have recovered from estate assets a total of $ 308,397,257 as of December 31, 1999. As of September 15, 2000, the funds reported approximately 13,737 pending claims.

[9] The United States granted conditional waivers of its claims under 31 U.S.C. § 3713 for the four previous distributions by the Receiver.

denial of late filed claims.[10] She now requests a declaration from this court on these same points. In response, the United States asserts that all federal claims in this liquidation proceeding are entitled to first priority under 31 U.S.C. § 3713, and at least over guaranty fund claims. The United States further asserts that federal claims are not subject to Massachusetts' filing deadline.

II. THE STATE DISTRIBUTION PRIORITIES (COUNT II)

The general federal priority statute, 31 U.S.C. § 3713, entitles federal claims to first priority when "a person indebted to the Government is insolvent and ... an act of bankruptcy is committed." 31 U.S.C. § 3713(a)(1)(A)(iii).

By contrast, the Massachusetts insurance liquidation statute, Mass. Gen. Laws ch. 175 § 180F, accords fourth priority to non-policyholder claims of the United States in insurance liquidation proceedings.[11] Under the state statute, a receiver may

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[10] This motion is pending the outcome of the instant proceeding. In connection with the motion, the receivership court also submitted four questions of law to the full Supreme Judicial Court. *In the Matter of the Liquidation of American Mutual Liability Insurance Company*, 434 Mass. 272, 747 N.E.2d 1215 (Mass. 2001).

[11] Mass. Gen. Laws ch. 175 § 180F establishes the following order for distribution of claims:

(1) expenses of administration;
(2) claims of policyholders, beneficiaries and insureds and claims of insurance guaranty funds;
(3) claims for return premiums;
(4) claims of the federal government other than those included in class 2 or 3;
(5) compensation of employees;

make payments to claimants in a particular priority class only if all claimants in higher priority classes have been paid in full or adequate funds have been set aside for such payments. Mass. Gen. Laws ch. 175 § 180F.

A. The Preemption Landscape

Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, federal law ordinarily will preempt a conflicting state law, even where congressional preemptive intent is implicit. *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 30-31, 116 S.Ct. 1103, 134 L. Ed. 2d 237 (1996). However, the McCarran-Ferguson Act provides for a special anti-preemption exemption when state regulation of the "business of insurance" is involved.[12] By its terms, the Act operates to preserve a state statute from federal preemption where: (1) the state statute has been enacted "for the purpose of regulating the business of insurance;" (2) application of the relevant federal statute would "invalidate, impair, or supersede" that state statute; and (3) the federal statute does not itself "specifically relate to the business of insurance." 15 U.S.C. § 1012(b). As restated in *United States Dept. of Treasury v. Fabe*, 508 U.S. 491, 507, 113 S.Ct. 2202, 124 L. Ed. 2d 449 (1993), under the McCarran-Ferguson Act "state laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise."

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(6) claims for taxes and debts due to any state or local government; and
(7) all other claims.

[12] Congress enacted the McCarran-Ferguson Act for the specific purpose of recognizing the states' primary responsibility for regulating the insurance industry. *See SEC v. National Sec., Inc.*, 393 U.S. 453, 458, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969).

It is clear that 31 U.S.C. § 3713 operates to "invalidate, impair, or supersede" the distribution priorities established by Mass. Gen. Laws ch. 175 § 180F. See 15 U.S.C. § 1012(b). By according first priority to all claims of the United States, the federal priority statute necessarily conflicts with assignment of fourth priority to federal non-policyholder claims under the Massachusetts scheme. The United States does not dispute that the McCarran-Ferguson Act inquiry is satisfied in this regard.

The United States also concedes that the Supreme Court made clear in Fabe that 31 U.S.C. § 3713 does not "specifically relate[] to the business of insurance" for McCarran-Ferguson Act purposes. *See* 15 U.S.C. § 1012(b); *Fabe*, 508 U.S. at 501, 113 S.Ct. 2202.

Consequently, the priority issue in this case will hinge solely upon the remaining element of the McCarran-Ferguson Act inquiry: whether the priority scheme established by Mass. Gen. Laws ch. 175 § 180F, at least to the extent it subordinates federal non-policyholder claims to guaranty fund claims, was enacted "for the purpose of regulating the business of insurance." *See* 15 U.S.C. § 1012(b).

B. Was the Massachusetts Priority Scheme Enacted "For the Purpose of Regulating the Business of Insurance"?

In addressing a similar conflict between 31 U.S.C. § 3713 and an Ohio statute conferring fifth priority upon federal non-policyholder claims in liquidation proceedings, the Supreme Court in *Fabe* reasoned that a state statute relating to the actual performance of an insurance contract should be

considered enacted "for the purpose of regulating the business of insurance."[13] 508 U.S. at 503, 113 S.Ct. 2202. The Court found that a state statute designed, like the one before it, "to ensure the payment of policyholders' claims despite the insurance company's intervening bankruptcy" is "integrally related to the performance of insurance contracts." *Id.* at 504, 113 S.Ct. 2202. Therefore, in respect of the Ohio statute's assignment of a higher priority to policyholder claims over federal non-policyholder claims, the Court held all three conditions for McCarran-Ferguson Act preservation of the state law to have been met. *Id.* at 508, 113 S.Ct. 2202.

At the same time, the Court took care to emphasize the critical character of the nexus with policyholder claims to its analysis. Thus, it declined to view the Ohio statute in its entirety as a law enacted "for the purpose of regulating the business [**15] of insurance" to the degree that particular provisions of the statute were not "'aimed at protecting or regulating this relationship [between insurer and insured], directly or indirectly.'" 508 U.S. at 501, 113 S.Ct. 2202 (quoting *SEC v. National Securities, Inc.*, 393 U.S. 453, 460, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969)).

This rejection of an "all-or-nothing approach" led the Court to a parsing of the Ohio statute's distribution priorities.[14] With respect to the Ohio

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[13] In so doing, the Court affirmed but did not consider itself overly restricted by the criteria for determining what constitutes the "business of insurance" set forth in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982).

[14] The Ohio statute ranked federal claims behind administrative expenses, employee wage claims, policyholder and guaranty fund claims, and general creditor claims. 508 U.S. at 497 n. 2., 113 S.Ct. 2202.

statute's prioritization of administrative expenses over federal non-policyholder claims, the Court denied 31 U.S.C. § 3713 preemptive effect, finding the preference "reasonably necessary to further the goal of protecting policyholders."[15] 508 U.S. at 509, 113 S.Ct. 2202. But the Court refused to read the McCarran-Ferguson Act as similarly exempting from federal preemption the Ohio statute's prioritization of the claims of employees and general creditors. Acknowledging that "every preference accorded to the creditors of an insolvent insurer ultimately may redound to the benefit of policyholders by enhancing the reliability of the insurance company," the Court nevertheless found such a connection to be "too tenuous" to escape preemption. *Id.*

Thus, under *Fabe*, I may consider the distribution priorities under Mass. Gen. Laws ch. 175 § 180F to have been enacted "for the purpose of regulating the business of insurance"—and hence, exempt from federal preemption—only insofar as they are aimed with some precision at protecting or regulating policyholders.

The United States contends that Massachusetts' prioritization of guaranty fund claims over federal non-policyholder claims does not function to protect policyholders because it "permits the enormous claims of state insurance guaranty funds to compete as claims of equal rank with the claims of policyholders (including the federal government) for the assets of a failed insurance company, by allowing the claims of the guaranty funds to share in the same creditor class as policyholders." By so doing, the argument goes, the distribution priority "virtually

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[15] Without payment of such expenses, the Court reasoned, "liquidation could not even commence." 508 U.S. at 509, 113 S.Ct. 2202.

ensures that policyholders will *not* receive payment on their claims against an insolvent insurer," because policyholders will receive far smaller distributions than if the guaranty funds occupied a lower priority class. Thus, the United States concludes, at least Massachusetts' prioritization of guaranty fund claims over federal non-policyholder claims ought to be preempted by the federal priority statute.[16]

The United States raised the same argument unsuccessfully in *Boozell v. United States*, 979 F. Supp. 670 (N.D.Ill. 1997), where it challenged the Illinois Insurance Liquidation Law's distribution priorities.[17] 979 F. Supp. at 678. The district court there held that guaranty funds are, by their very nature, "designed to protect policyholders of an insolvent insurer" because they are obligated to pay the claims of policyholders of insolvent insurers, who are then deemed to have assigned their rights of recovery to such funds.

The contentions of the United States can be put in perspective by focusing on the way in which MIIF, the primary guaranty fund in Massachusetts, is designed to operate. MIIF is required to pay all Massachusetts claims arising out of and within the

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[16] I note that *Fabe* did not specifically address the question of guaranty fund claims, despite the fact that the Ohio statute in question also accorded such claims equal status to policyholder claims. *See Fabe*, 508 U.S. at 497 n. 2, 113 S.Ct. 2202. On remand, the trial court struck down the statute in its entirety, concluding that the portions of the statute preempted by the Supreme Court's decision in Fabe could not be severed from the remainder of the Ohio priority scheme. *Duryee v. Dept. of Treasury*, No. 77-1205 (S.D. Ohio Aug. 15, 1995).

[17] The Illinois Liquidation Law assigns sixth priority to non-tax federal claims against insolvent insurers. It assigned fourth priority to claims by policyholders and guaranty funds. 979 F. Supp. at 677-78.

coverage of relevant policies issued by an insurer which becomes insolvent. Mass. Gen. Laws ch. 175D, § 1(2). MIIF stands in the shoes of the policyholders who recover from the MIIF. These policyholders are deemed to have assigned their rights under the policy to the fund to the extent of their recovery. Mass. Gen. Laws ch. 175D § 8(1). In recovering from an insolvent insurer's estate, the MIFF then assumes a priority equal to that which policyholders who have recovered from the fund would have enjoyed in its absence. Mass. Gen. Laws ch. 175D § 8(2). And in doing so, MIIF recovers only to the extent the policy holders it has paid could.

Under this regime, guaranty funds benefit certain policyholders by expediting the resolution and payment of claims. The funds begin paying claims immediately after an insolvency and continue doing so even after applicable time bars have run. By contrast, a state appointed receiver generally cannot distribute any estate assets until the identity and amount of all claims are known.

Guaranty funds further benefit certain policyholders by providing greater recoveries than would otherwise have been available from estate distributions in liquidation proceedings. Regardless of the extent of an insolvent insurer's assets, the funds pay each covered claim up to the lesser of policy limits or a $ 300,000 dollar cap (again excepting workers' compensation claims, which are not capped). By contrast, the Receiver estimates that in the particular liquidation proceeding at issue here, the insolvent companies' assets on their own would have been sufficient only to reimburse workers' compensation policyholders partially (albeit substantially), and other policyholders not at all. It is only because of guaranty funds that almost all workers' compensation claims

have been paid in full, and other claimants reimbursed up to statutory limits (typically $300,000).

Put in this perspective, the contention of the United States that guaranty fund claims create new competition with policyholder claims is specious. In the absence of guaranty funds, those policyholder claims that such funds currently reimburse would remain directly in the competitive mix, potentially reducing *pro tanto* the available assets of the estate. The guaranty funds thus benefit policyholders, even if the funds' priority status in liquidation proceedings bestows a somewhat indirect benefit to policyholders who have passed their claims onto the guaranty funds. In this regard, I consider guaranty funds to occupy a critically different position vis-a-vis policyholder interests than do, for example, the general creditors of an insolvent insurer. Guaranty funds themselves are integral to the general "goal of protecting policyholders." They do so with precision.[18] Consequently, I am not prepared to dismiss their priority status under Mass. Gen. Laws ch. 175 § 180F as not "reasonably necessary to further" that goal.

I find no meaningful question that guaranty funds are designed to protect and benefit certain

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[18] I note that the Ohio statute in dispute before the Court in *Fabe* also accords the claims of guaranty funds equal priority with those of policyholders. Although concededly the question was not framed as such, the Supreme Court in *Fabe* made no suggestion that this prioritization over federal non-policyholder claims goes beyond the "purpose of regulating the business of insurance," as it found to be the case with respect to employee wage and general creditor claims. Indeed, *Fabe* necessarily recognized the role played by guaranty funds as benefitting policyholders when it upheld the first priority to administrative costs, a category which included "the reasonable expenses of a guaranty association . . . in handling claims." *See Fabe*, 508 U.S. at 497 n. 2, 113 S.Ct. 2202.

policyholders of an insolvent insurer by affording prompter and potentially larger payments on claims than would be possible if those policyholders were required to wait for a receiver's distributions.[19] Therefore, I find that the priority accorded the claims of guaranty funds over federal non-policyholder claims in insurance liquidation proceedings under Massachusetts law to be a provision enacted "for the purpose of regulating the business of insurance," and accordingly conclude it is saved by the McCarran-Ferguson Act from preemption under the general federal priority statute, 31 U.S.C. § 3713.

III. THE STATE FILING DEADLINE (COUNT I)

The Receiver also requests a declaration that federal claims are subject to the March 9, 1990 deadline set by the state receivership court pursuant to Mass. Gen. Laws ch. 175 § 180F. The United States does not contest that certain of its claims were brought after this March 9, 1990 deadline. However, it does contend, first, that federal claims generally are not bound by state rules of limitation, *see United States v. Summerlin*, 310 U.S. 414, 60 S.Ct. 1019, 84 L. Ed. 1283 (1940), and, second, that 31 U.S.C. § 3713 operates to preempt Massachusetts law in this regard, because the state filing deadline was not enacted "for the purpose of regulating the business of insurance." *See* 15 U.S.C. § 1012(b).

A. State Impairment of Federal Claims

The United States argues that the imposition of any time limitation on federal claims is prohibited by

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[19] I note, moreover, they achieve that result without obtaining greater rights in liquidation proceedings than other policyholders.

the principle that the United States is not "bound by state statutes of limitation or subject to the defense of laches in enforcing its rights." *United States v. Summerlin*, 310 U.S. 414, 416, 60 S.Ct. 1019, 84 L. Ed. 1283 (1940) (internal citations omitted). The Court in Summerlin explained that when the United States asserts a claim in its sovereign capacity, "it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement." 310 U.S. at 417, 60 S.Ct. 1019 (internal citation omitted).

The general principle expressed in *Summerlin* is well-established. *See, e.g., Bresson v. Commissioner of Internal Revenue*, 213 F.3d 1173, 1175-77 (9th Cir. 2000) (a valid federal claim cannot be "cut off" by a state statute of limitations, so long as acquired before the limitations period has run); *see also Brown v. Coleman*, 318 Md. 56, 566 A.2d 1091 (Md. 1989) (federal priority cannot be superseded or impaired by state law). However, its preemptive effect here (through the general federal priority statute, 31 U.S.C. § 3713) cannot overcome the particular niche for state authority carved out by the McCarran-Ferguson Act, which was enacted by Congress five years after *Summerlin* was decided. Thus, despite the enduring general vitality of the *Summerlin* principle, the United States will be deemed to have chosen to become subject to the state filing deadline in this case to the degree the McCarran-Ferguson Act protects such rules.

B. Was the Massachusetts Filing Deadline Enacted "For the Purpose of Regulating the Business of Insurance"?

It bears re-emphasizing that *Fabe* holds a state law is deemed to have been enacted "for the purpose of regulating the business of insurance" under the

McCarran-Ferguson Act only to the extent that it regulates or protects policyholders. 508 U.S. at 508, 509 n. 8, 113 S.Ct. 2202. Thus, I must determine if Massachusetts' filing deadline in insurance liquidation proceedings in fact serves to regulate or protect policyholders.

The First Circuit, shortly after *Fabe* was handed down, specifically considered whether such a state deadline was enacted to regulate the business of insurance. *Garcia*, 4 F.3d 57 at 60-62. At issue in *Garcia* was a Puerto Rico law permitting the Insurance Commissioner to set a claims filing deadline, and to delay payment of any late claims until all timely-filed claims "have been paid in full with interest." *Id.* at 60-61 (internal quotation omitted). One year after the deadline established for an insurance insolvency,[20] the IRS filed a claim representing federal tax liens on the insolvent company's assets, and sought priority payment pursuant to the federal priority statute. *Id.*

Then Chief Judge Breyer concluded that the federal priority statute did preempt the state filing deadline, reasoning that the state provision "cannot be said to directly 'regulate[] policyholders,' for it is neither directed at, nor necessary for, the protection of policyholders, as the [*Fabe*] Court required." *Id.* at 62. He explained that the state filing deadline was not *directed at* the protection of policyholders, insofar as it "helps policyholders only to the extent that (and in the same way as) it helps all creditors."[21] *Id.* He added that the deadline was not *necessary* for the protection

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[20] *Garcia* involved the liquidation of a health maintenance organization. 4 F.3d at 58.

[21] "That is to say, by penalizing late-filers, the Commonwealth provision may bring about more speedy, orderly liquidation proceedings, thereby (perhaps) reducing the risks (and costs) of extending credit to the company." *Id.*

of policyholders, noting that without it, "liquidation would still prove manageable. At worst, the trustee's job would become slightly more difficult," in contrast to the payment of administrative expenses, recognized by *Fabe* as "necessary to protect policyholders, ... because [otherwise], liquidation might never occur." *Id.* On the whole, the Garcia court found the state filing deadline in that case to provide policyholders with "only indirect, speculative benefit of the kind that the *Fabe* Court found far too tenuous to prevent pre-emption." *Id.*

Garcia has not met with universal acceptance. The District Court in *Boozell*, for example, "expressly" rejected Garcia and its narrow reading of *Fabe*, 979 F. Supp. at 678. Other circuits have politely questioned whether *Fabe* in fact mandates narrow parsing of state insurance statutes, of the sort engaged in by the court in *Garcia*, to determine which provisions specifically protect policyholders. *See, e.g., Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585, 592 (5th Cir. 1998) (acknowledging that, under *Fabe*, "a statute may require parsing to determine the extent of its pre-emptive power under the McCarran-Ferguson Act," but noting that "the Court stopped short of directing that this approach be taken in every case," such that, "*Fabe*'s holding in this respect is simply unclear."); *see also Stephens v. American Int'l Ins. Co.*, 66 F.3d 41, 44-45 (2d Cir. 1995) (anti-arbitration provision contained in Kentucky Liquidation Act upheld as "simply one piece" of Act's overall purpose of "assuring that an insolvent insurer will be liquidated in an orderly and predictable manner.")[22]

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[22] The Tenth Circuit, in upholding a Utah statute staying proceedings against an insolvent insurer against preemption by the Federal Arbitration Act, distinguished *Garcia* without questioning it by observing that the filing deadline at issue in

A focused critique was presented by the court in *Clark v. Blue Cross Blue Shield of West Virginia*, 203 W. Va. 690, 510 S.E.2d 764 (W.Va. 1998), which specifically rejected *Garcia*'s logic that a state filing deadline in insurance liquidation proceedings does not, considered on its own merits, qualify as protecting policyholders for McCarran-Ferguson Act purposes. The state court in *Clark* held that a West Virginia filing deadline on claims against insolvent insurance companies is not preempted by the federal priority statute, because such a deadline assures that policyholder claims "will be handled in a timely and orderly fashion," and because it "reduces the administrative costs of liquidation" (thereby preserving more estate assets to be distributed to policyholders on their claims). 510 S.E.2d at 784-85.[23]

The record before me suggests the *Garcia* panel may have understated the disruption which an open-ended opportunity for federal government claims has upon insurance liquidation proceedings. Absent a deadline for claims applicable to all creditors, a receiver will not be willing to make a final distribution because the prospect of unanticipated claims would render impossible a final determination.[24] The result

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Garcia "would have applicability in any form of debt liquidation proceeding and it is not in any way peculiar to the business of insurance." *Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277, 1281 n.5 (10th Cir. 1998).

[23] In concluding its analysis, the *Clark* court observed that the *Garcia* decision "has not been followed by any other court . . . [and] has been criticized as interpreting *Fabe* too narrowly." *Id.* at 785.

[24] Ruthardt notes that if she distributes assets upon approval of a receivership court, and later filed claims of the United States are deemed valid, she might face personal liability under 31 U.S.C. § 3713(b).

would be to require known policyholder creditors to wait indefinitely for reimbursement.[25]

Since *Garcia*, the First Circuit itself has recognized the practical need for a claims filing date in insurance company liquidation proceedings, and acknowledged that a bar date serves the "strong interest in rapidly resolving and quantifying all claims" against an insolvent insurer. *See Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciente*, 125 F.3d 9, 17 (1st Cir. 1997). The court there explained:

> If the Insurance Commissioner were required to accept claims against the liquidated PCFA indefinitely that would clearly contravene the legitimate legislative goal of finality, and could well delay distribution of funds to any claimant. In addition to the administrative difficulties involved in permitting the continued filing of claims against PCFA, due to the limited availability of funds, known claimants might be required to await the filing of future claims before they could collect on their own. Absent a claims bar date, neither the affairs of PCFA nor the interests of pending claims could be finalized. ... We recognize ... the legislature's legitimate purpose in setting a claims bar date, and find that it was reasonable and necessary under the circumstances.

Id., at 17-18.

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[25] Ruthardt acknowledges that timely and orderly distribution of funds will benefit all creditors in a liquidation proceeding (not just policyholders), but contends that the primary benefit will accrue to policyholders, insofar as the vast majority of claims against an insolvent insurer's estate are made by policyholders and guaranty funds under statutory assignments of policyholder rights.

Ruthardt urges me to further consider that the First Circuit has not cited *Garcia* in three subsequent decisions addressing either insurer receivership bar dates or the McCarran-Ferguson Act (citing *Mercado-Boneta*, 125 F.3d at 17-18, *United States v. Rhode Island Insurers' Insolvency Fund*, 80 F.3d 616, 619 (1st Cir. 1996), and *Villafane-Neriz v. FDIC*, 75 F.3d 727, 735 (1st Cir. 1996)). The suggestion apparently is that Garcia has been abandoned *sub silentio*.

To be sure, there are distinctions between *Garcia* and subsequent cases. The state court in *Clark*, for example, placed emphasis on the fact that the West Virginia deadline did not serve to prohibit late-filed federal claims absolutely, but merely subordinated such claims in distribution priority to timely-filed claims. 510 S.E.2d at 778. By contrast, Mass. Gen. Laws ch. 175 § 180F appears to contemplate an absolute bar against late-filed claims.[26] *Mercado-Boneta*, to take another example, involved the application of a claims filing deadline to a private party, rather than to the federal government. 125 F.3d 9. Neither the federal priority statute nor the applicability of the McCarran-Ferguson Act were at issue in that case.

Such distinctions, however, do not seem to make a meaningful difference. There is a compelling argument for the proposition that benefits are accorded policyholders by a state filing deadline in liquidation proceedings. In particular, *Garcia* seems to have been insufficiently sensitive to the fact that late-filed federal *policyholder* claims may substantively, and rather directly, interfere with the timely and

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[26] The United States notes that while Mass. Gen. Laws ch. 175 § 180F does not explicitly state that late-filed claims are invalidated, the Complaint and its attachments indicate that such claims are not processed by the receiver.

orderly distribution of funds to general policyholder creditors.

Nevertheless, because *Garcia* remains controlling law in this circuit, I am bound by its holding. Under any fair reading of *Garcia*, I am obligated to find that the Massachusetts filing deadline in insurance liquidation proceedings was not enacted "for the purpose of regulating the business of insurance," and as such is preempted by the federal priority statute, 31 U.S.C. § 3713. It is the prerogative of the Court of Appeals and not the District Court to overrule precedent established by an appellate panel. *Cf. United States v. Hatter*, 532 U.S. 557, 121 S.Ct. 1782, 1790, 149 L.Ed.2d 820 (2001). Indeed, it is apparently the First Circuit *en banc*, rather than simply another First Circuit panel, which has that prerogative with respect to *Garcia*. *United States v. Roth Chhien*, 2001 WL 1097766, 266 F.3d 1, 8 (1st Cir. 2001) (holding "a prior panel decision inviolate absent either the occurrence of a controlling intervening event (e.g., a Supreme Court opinion on the point; a ruling of the circuit, sitting en banc; or a statutory overruling), or, in extremely rare circumstances, where non-controlling but persuasive case law suggests such a course"). Lacking the authority to reject *Garcia*, I must apply it and give judgment on Count I to the United States.

IV. MOTION TO INTERVENE

As noted, *see* note 1, *supra*, certain state insurance guaranty funds and associations (the "Guaranty Funds")[27] have moved to intervene in this

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[27] These are guaranty funds and associations from Alabama, California, Connecticut, the District of Columbia, Illinois, Louisiana, Maine, Massachusetts, Missouri, Nebraska,

proceeding in further defense of Mass. Gen. Laws ch. 175 § 180F against federal preemption. The Guaranty funds seek essentially the same declaration sought by the Receiver: that (1) the Guaranty Funds' claims to the assets of the Companies' estates are entitled to priority over non-policyholder federal claims, and (2) any federal claims to such assets are subject to the March 9, 1990 deadline set by the state receivership court. (Guaranty Funds' Compl. ¶¶ 1-2.)

A. Intervention as of Right

Intervention as of right is governed by Fed. R. Civ. P. 24(a), which provides that:

> Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2).

To satisfy the requirements of Rule 24(a)(2), a party must therefore (1) make a timely application; (2) demonstrate an interest relating to the property or transaction which is the subject of the action; (3) show that disposition of the action threatens to impair or impede its ability to protect that interest; and (4) show that existing parties inadequately represent its interest. *Public Service Co. of New Hampshire v. Patch*,

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Nevada, New Hampshire, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, and Virginia.

136 F.3d 197, 204 (1st Cir. 1998). The First Circuit has emphasized that in the evaluation of asserted claims to intervention as of right, these four elements ought to "be read not discretely, but together, and always in keeping with a commonsense view of the overall litigation." *Id.* (citation omitted). At the same time, all four elements need to be met: "failure to satisfy any one of them dooms intervention." *Id.*

In this case, the United States does not challenge the timeliness of the Guaranty Funds' motion to intervene.[28] Similarly clear are the Guaranty Funds' interest in the subject matter of the action, as well as the potential impairment of their ability to protect that interest. With claims exceeding $ 225 million in the American Mutual estate alone, the Guaranty Funds have precisely the sort of direct interest in the distribution of the Companies' assets that is required. *See id.*, 205-06; *Conservation Law Foundation of New England, Inc. v. Mosbacher,* 966 F.2d 39, 42 (1st Cir. 1992). And given that the Companies' assets are insufficient to satisfy every creditor, the potential that the federal priority statute preempts the Massachusetts distribution scheme

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[28] The Receiver's Complaint was filed on November 22, 2000 and the Guaranty Funds sought intervention on February 2, 2001. Not only is this delay minimal, but I note that the motion to intervene further satisfies the additional criteria the First Circuit has set forth for determining timeliness: (1) no prejudice will result to the existing parties because of the delay; (2) given the economic interests of the would-be intervenors, the possibility that they will suffer prejudice if not allowed to intervene merits consideration; and (3) there do not appear to be any unusual circumstances militating against intervention. *See Tutein v. Daley,* 43 F. Supp. 2d 113, 126-27 (1st Cir. 1999); *Culbreath v. Dukakis,* 630 F.2d 15, 20-24 (1st Cir. 1980).

necessarily will impact the Guaranty Funds' recovery in the liquidation proceeding.[29]

Whether the Guaranty Funds have a right to intervene hinges, therefore, on the fourth element of Rule 24(a)(2): the adequacy of representation by existing parties. The Supreme Court has said that would-be intervenors need only make a minimal showing in this regard, and only to the effect that representation may be inadequate (not that it actually is). *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972) (cited in *Maine v. Director, United States Fish and Wildlife Service*, 262 F.3d 13, 2001 WL 963707 (1st Cir. 2001)). At the same time, that showing must include "some tangible basis to support a claim of purported inadequacy." *Patch*, 136 F.3d at 207. Furthermore, this "burden of persuasion is ratcheted upward" when a private party wishes to intervene to defend a public act which the relevant governmental body is itself defending. *Id.*; *Maine*, 262 F.3d at 18-29.

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[29] In this connection, the United States suggests that the Guaranty Funds will suffer no adverse economic impact from a judgment that the Massachusetts distribution scheme is preempted, insofar as any failure to recover from the Companies' estates will be compensated for by assessments on member insurers. I find this argument too conditional for purposes of the Rule 24(a) inquiry. It overlooks, moreover, the degree to which fuller reliance on such assessments would affect functioning of the Guaranty Funds, and certainly does not account for the vigor with which the Guaranty Funds have pressed their case here. It merits emphasis that this analysis in no way draws on the Guaranty Funds' further contention that my decision in this action will have a *stare decisis* effect upon all other pending and future insurer insolvency proceedings. The judgments of this court are not binding in other jurisdictions; they serve as no more than persuasive authority to other courts that may look to them for guidance.

Nevertheless, in keeping with its "commonsense" approach to intervention, the First Circuit has suggested some grounds upon which a court might possibly question the adequacy of such a governmental defense, particularly in the regulatory context, vis-a-vis private interests. None of those grounds are applicable here. The Guaranty Funds were not previously engaged in an adversary relationship with the Commissioner regarding the distribution scheme in insurance insolvency proceedings. *See id.*, at 20-21. Nor is there any significant sense in which the interests of the Commissioner and the Guaranty Funds currently diverge. *See id.* It may be true that the Commissioner has less personal economic interest in the outcome of this action, but her defense of Massachusetts' distribution scheme has been well developed and vigorous. Not only is it the case that Mass. Gen. Laws ch. 175 § 180F benefits Massachusetts policyholders generally, but the Commissioner has a personal stake in timely and orderly liquidation proceedings. And in fact, the Commissioner has proved "ready, willing, and able to vigorously defend" the Massachusetts law. *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982). This full-scale defense, coupled with the Guaranty Funds' participation as amici, has rendered the Funds unable to identify any legal argument or evidence that has been kept from this court by virtue of their exclusion as parties. *See Mass. Food Assoc. v. Mass. Alcoholic Beverages Control Comm.*, 197 F.3d 560, 567 (1st Cir. 1999).

The Guaranty Funds urge one last basis for a finding of inadequacy. They suggest that the Commissioner might decide not to appeal from an adverse judgment, whereas they certainly would want such an appeal to go forward. The Guaranty funds bootstrap inadequacy of representation as emerging from that potential scenario. If such a scenario were to

develop, however, the Guaranty Funds could seek to intervene, under Rule 24(a)(2), at that stage. *See id.*, at 568; *see also Daggett v. Comm. on Governmental Ethics and Election Practices,* 172 F.3d 104, 112 (1st Cir. 1999); *Americans United for Separation of Church and State v. City of Grand Rapids,* 922 F.2d 303, 306 (6th Cir. 1990 ; *Smuck v. Hobson,* 132 U.S. App. D.C. 372, 408 F.2d 175 (D.C.Cir. 1969); 7C Wright, Miller & Kane, *Federal Practice and Procedure* § 1909, at 345 & n.38 (1986). This opportunity renders the Guaranty Funds' potential future harm remediable.

I cannot find any past or foreseeable basis to deem the Commissioner's defense of the Massachusetts distribution scheme inadequate, vis-a-vis the Guaranty Funds' interests. Consequently, the motion for intervention as of right will be denied without prejudice to resubmittal in light of the appellate posture of these proceedings.

B. Permissive Intervention

Even where intervention as of right is not recognized, permissive intervention may be granted, at the discretion of the court, where (1) the application to intervene is timely; (2) the applicant's claim and the main action share a common question of law or fact; and (3) intervention would not result in undue delay or prejudice to the original parties. Fed. R. Civ. P. 24(b). Given the adequacy of the Commissioner's representation in this case, however, I am disinclined to permit the intervention. The fact that the Commissioner's potential refusal to appeal an adverse judgment does not, according to the caselaw, necessarily foreclose the Guaranty Funds ability to take on such appeal *at that stage* further convinces me that there is no need to permit intervention at the present time.

Thus, the motion for permissive intervention is DENIED.

V. CONCLUSION

For the reasons set forth more fully above, I DENY the Guaranty Funds' motion for intervention, and GRANT the Receiver's motion for summary judgment only as to Count II.[30] Accordingly, I direct that judgment be entered declaring that the Receiver may pay the claims of insurance guaranty funds on behalf of policyholders, in accordance with Mass. Gen. Laws ch. 175 § 180F, prior to non-policyholder claims of the United States.

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[30] I find *Garcia* bars judgment for the Receiver on Count I, the filing deadline issue, and I find Count III moot. Count III of the Complaint sought relief under § 706(1) of the Administrative Procedures Act ("APA"), which requires a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The Receiver claims that the Department of Justice "unreasonably delayed" acting on her request that the United States assent or conditionally waive its claims under 31 U.S.C. § 3713 to the proposed fifth "early access" distribution to the guaranty funds. The complaint sought a judgment ordering the United States to act on the Commissioner's request. The United States moved to dismiss Count III on the ground that its "decision not to consent to the conditional waiver is not reviewable" under the APA; the Receiver acknowledges that Count III of the complaint is moot in any event because the United States through this litigation has denied her request.

JUDGMENT

In accordance with the Memorandum and Order issued September 27, 2001, Denying the Guaranty Funds' Motion for intervention, and Granting the Receivers Motion for Summary Judgment only as to Count II, and finding judgment for the Receiver on Count I is barred and Count III is moot, it is hereby ORDERED, ADJUDGED AND DECREED:

> **Judgment is entered declaring that the Receiver may pay the claims of insurance guaranty funds on behalf of policyholders, in accordance with Mass. Gen. Laws ch. 175 § 180F, prior to non-policyholder claims of the United States.**

APPENDIX C

United States Court of Appeals
For the First Circuit[1]

Nos. 01-2587, 01-2668

JULIANNE M. BOWLER, in her official capacity as the Commissioner of Insurance of the Commonwealth of Massachusetts and Permanent Receiver of American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston,

Plaintiff-Appellant/Cross-Appellee,

ALABAMA INSURANCE GUARANTY ASSOCIATION, CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, CONNECTICUT INSURANCE GUARANTY ASSOCIATION, DISTRICT OF COLUMBIA INSURANCE GUARANTY ASSOCIATION, ILLINOIS INSURANCE GUARANTY FUND, LOUISIANA INSURANCE GUARANTY ASSOCIATION, MAINE INSURANCE GUARANTY ASSOCIATION, MASSACHUSETTS INSURERS INSOLVENCY FUND, MISSOURI PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION, NEBRASKA PROPERTY AND LIABILITY INSURANCE GUARANTY ASSOCIATION, NEW HAMPSHIRE INSURANCE GUARANTY ASSOCIATION, PENNSYLVANIA WORKERS' COMPENSATION SECURITY FUND, RHODE ISLAND INSURERS' INSOLVENCY FUND, SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION, VERMONT PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION, AND VIRGINIA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,

Plaintiffs-Appellants/Cross-Appellees,

v.

UNITED STATES; JOHN ASHCROFT, in his official capacity as Attorney General of the United States,

Defendant-Appellee/Cross-Appellant.

Before

Boudin, Chief Judge,
Torruella, Selya, Circuit Judges,
Greenberg, *Senior Circuit Judge,
Lynch, Lipez and Howard, Circuit Judges.

ORDER OF COURT

Entered: November 19, 2002

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

Denied.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk

[All attorneys of record.]

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* of the Third Circuit, sitting by designation.

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 01-2553

LINDA RUTHARDT,
in her official capacity as COMMISSIONER OF INSURANCE OF THE COMMONWEALTH OF MASSACHUSETTS and PERMANENT RECEIVER OF AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

Plaintiff,

v.

UNITED STATES OF AMERICA and JOHN ASHCROFT, in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES,

Defendants, Appellees.

ALABAMA INSURANCE GUARANTY ASSOCIATION, ET AL.,

Movants, Appellants.

No. 01-2587
No. 01-2668

LINDA RUTHARDT,
in her official capacity as COMMISSIONER OF INSURANCE OF THE COMMONWEALTH OF MASSACHUSETTS and PERMANENT RECEIVER OF AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

Plaintiff, Appellant/Cross-Appellee,

v.

UNITED STATES OF AMERICA and JOHN ASHCROFT, in his official capacity as ATTORNEY GENERAL OF THE UNITED STATES,

Defendants, Appellees/Cross-Appellants.

ALABAMA INSURANCE GUARANTY ASSOCIATION, ET AL.,

Movants.

Before

Boudin, Chief Judge,
Torruella, Selya, Lynch, Lipez,
Howard, Circuit Judges,
and Greenberg, *Senior Circuit Judge.

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* Of the Third Circuit, sitting by designation.

ORDER OF COURT

Entered: October 31, 2002

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk

[cc: all counsel of record.]

APPENDIX E

ANNOTED LAWS OF MASSACHUSETTS

CHAPTER 175. INSURANCE.

Chapter 175: Section 180F. Filing and Proving Claims in Liquidation Proceeding Begun in Commonwealth; Priorities of Distribution.

In any liquidation proceeding begun in this commonwealth against an insurer domiciled in this commonwealth, and transacting business in any other reciprocal state, claimants residing in a reciprocal state may file and prove claims either with the ancillary receiver, if any, or with the domiciliary receiver; provided, that all such claims shall be filed on or before the last date fixed by the court for the filing of claims in the domiciliary proceeding.

In any such proceeding, contested claims belonging to claimants residing in such reciprocal state either (a) may be proved in this commonwealth under the law of this commonwealth, or (b), if ancillary proceedings have been commenced in such reciprocal state, may be proved in such ancillary proceedings.

In the event a claimant elects to prove his claim in ancillary proceedings, if notice of the claim and opportunity to appear and to be heard is afforded the domiciliary receiver of the commonwealth as provided in section one hundred and eighty I with respect to ancillary proceedings in the commonwealth, the final allowance of such claim by the courts of the ancillary state shall be accepted in the commonwealth as conclusive as to its amount and priority, if any, against special deposits or other security located within the ancillary state. In a delinquency proceeding

against an insurer domiciled in the commonwealth, claims owing to residents of ancillary states shall be preferred claims if like claims are preferred under the laws of the commonwealth. All such claims, whether owing to residents or nonresidents, shall be given equal priority of payment from general assets regardless of where such assets are located.
In a delinquency proceeding against an insurer domiciled in a reciprocal state, claims owing to residents of the commonwealth shall be preferred if like claims are preferred by the laws of the state.

The priority of distribution from the general assets of an insurer in a liquidation proceeding shall be in the order set forth below. Every claim in each priority class shall, subject to such limitations as may be prescribed by law and that do not directly conflict with the express provisions of this section, be paid in full or adequate funds shall be retained for such payment before the members of the next class receive any payment. Except as otherwise expressly provided in this section, no subclasses shall be established within any of the first six priority classes. The order of distribution of claims shall be:

(1) expenses of administration;

(2) claims of policyholders, beneficiaries and insureds arising from and within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company and claims presented by the Massachusetts Insurers Insolvency Fund, the Massachusetts Life and Health Insurance Guaranty Association or any similar organization in another state, but the workers' compensation claims afforded a preference in section 46A shall be treated as preferred only as respects all other claims in this clause;

(3) claims for return premiums under section 46;

(4) claims of the federal government other than those included in class 2 or 3;

(5) compensation of employees other than officers for services rendered within three months prior to the commencement of a proceeding under section 180C not to exceed $1,000 for each such employee;

(6) claims for taxes and debts due to any state or local government, which are secured by liens perfected prior to the commencement of delinquency proceedings; and

(7) all other claims.

During the pendency of delinquency proceedings in the commonwealth or any other state, no action or proceeding in the nature of an attachment, garnishment, or levy on execution shall be commenced or maintained in the courts of the commonwealth against the delinquent insurer or its assets. Any lien obtained by any such action or proceeding within four months prior to the commencement of any such delinquency proceeding or any time thereafter shall be void as against any rights arising in such delinquency proceeding.

Separate account agreements providing that the assets in separate accounts to which such agreements relate shall not be chargeable with liabilities arising out of any other business of the insurer shall, to the extent of the reserves and other contract liabilities with respect to such agreements, be satisfied out of the assets available in the related separate accounts, subject to the claims of creditors for services rendered

or credit extended with respect to such separate accounts. Such claims shall be payable in accordance with their terms, and to the extent, if any, that the insurer's obligations under such separate account agreements are not fully discharged by the assets available in such separate accounts, such deficiency shall be treated as a claim against the general assets of the life insurance company with the same priority as claims of policyholders, beneficiaries and insureds pursuant to the priority class set forth in clause (2) of the fifth paragraph.

APPENDIX F

Federal Priority Act: Title 31 United States Code

§ 3713. Priorty of Government claims

(a)(1) A claim of the United States Government shall be paid first when -

(A) a person indebted to the Government is insolvent and -

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed; or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 11.

(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

APPENDIX G

McCarran-Ferguson Act: Title 15 United States Code

Section 1011. Declaration of policy

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Section 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended (15 U.S.C. 41 et seq.), shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

Section 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act (15 U.S.C. 41 et seq.), and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Section 1014. Effect on other laws

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act (29 U.S.C. 151 et seq.), or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.), or the Act of June 5, 1920, known as the Merchant Marine Act, 1920 (46 App. U.S.C. 861 et seq.).

Section 1015. "State" defined

As used in this chapter, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Linda L. Ruthardt in her official capacity as COMMISSIONER OF INSURANCE OF THE COMMONWEALTH OF MASSACHUSETTS and PERMANENT RECEIVER of AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON, Plaintiff, v. UNITED STATES OF AMERICA, and Janet Reno, in her official capacity as ATTORNEY GENERAL OF THE UNITED STATES, Defendants.	) C.A. No. 00-CV-12417-DPW

AFFIDAVIT OF PAUL M. GULKO FILED WITH THE DISTRICT COURT IN SUPPORT OF RECEIVER'S MOTION FOR SUMMARY JUDGMENT

1. I, Paul M. Gulko, am the President of Guaranty Fund Management Services ("GFMS"), a non-profit association consisting of the state insurance guaranty funds and associations of the six New England states, Virginia and the

District of Columbia. GFMS administers these eight state insurance guaranty funds and associations (the "GFMS Funds").

2. I have personal knowledge of the matters hereinafter referred to, except those made on information and belief, and as to those I believe them to be true.

3. I make this affidavit in opposition to the motion by the United States to dismiss the above-captioned action and in support of the Receiver's motion for summary judgment.

4. I have been involved with the administration of state insurance guaranty funds for more than 25 years. I am personally responsible for the overall supervision of each of the GFMS Funds subject to the direction and control of the respective Board of Directors of such guaranty funds.

5. I have been involved with the administration of at least 88 insurer insolvencies. I am familiar with the operation of state insurance guaranty funds including the processing of payments for policyholders, assessments of member insurers to pay claims, recovery by guaranty funds from insolvent insurer estates and recoupment of guaranty fund assessments from the insurance-buying public.

6. Each state insurance guaranty fund is created and governed by a statute in its jurisdiction of organization. In Massachusetts, the statute is Chapter 175D of the Massachusetts General Laws.

7. In general each state guaranty fund provides protection for insureds and claimants residing in the state of the guaranty fund. See, e.g., M.G.L. c. 175D, §1(2). Each of the fifty states plus the District of Columbia and the Commonwealth of Puerto Rico has a guaranty fund.

8. The guaranty funds provide protection for certain claims covered by property and casualty insurance policies. Most lines of insurance are covered with certain exceptions stated in the statute governing the particular guaranty fund. See, e.g., M.G.L. c. 175D, §2, which governs the Massachusetts insurers Insolvency Fund (the "Massachusetts Fund"). Section 2 provides that the Massachusetts Fund applies to all kinds of direct insurance except life, accident and health and other stated exceptions.

9. Each guaranty fund statute creates a mechanism for the payment of claims under certain insurance policies issued by property and casualty insurers to avoid financial loss to claimants or policyholders because of the insolvency of an insurer and to provide an association to assess the cost of such protection among insurers. Some guaranty fund statutes state this purpose explicitly. See, e.g., Maine Revised Statutes §4432 and Rhode Island Gen. Laws §27-34-2. As explained herein the provision giving guaranty funds a priority equal to other policyholder claims in estate liquidation proceedings is an integral part of the statutory mechanism for the payment of claims under policies of insolvent insurers.

10. Guaranty funds pay only one type of claim. These are referred to in the guaranty fund statutes as "covered claims" and are defined as claims which arise out of and are within the coverage of a policy issued by an insurer which is determined to be insolvent. See, e.g., M.G.L. c. 175D, § 1(2). Policyholders are protected against both first party type claims (e.g. a fire loss) and third party type claims (e.g. tort claims).

11. All non-policy claims must be denied by the guaranty fund. See, e.g., M.G.L. c. 175D, §5(l)(d). Guaranty funds do not pay general creditor claims because they are not covered claims.

12. Guaranty funds benefit policyholders in at least three ways. First, guaranty funds provide for prompt payment. Second, guaranty funds provide greater recoveries than would be available from estate distributions. Third, guaranty funds provide a defense to the policyholder.

13. Liquidation proceedings by their nature do not allow for prompt payment of claims because a liquidator is reluctant to pay out available estate assets without knowing the identity and amount of all claimants. Otherwise, funds might be unavailable for claims asserted or quantified later in time (see ¶¶ 23-27 below further on this point). Guaranty funds ameliorate the problem of delay in payment because guaranty funds commence paying claims immediately after an insolvency and continue paying claims until applicable time bar periods or statutes of limitation have run.

14. In addition to avoiding delay in payment guaranty funds increase the amounts recovered by policyholders because the guaranty funds pay each covered claim up to the lesser of policy limits or a specified dollar cap. The dollar cap for most guaranty funds including the eight OGMS Funds, is $300,000 on a covered claim, except in the case of workers' compensation claims where there is no cap. See, e.g., M.G.L. c. 175D, §5(l)(a). In my experience most non-workers' compensation claims are satisfied by the guaranty funds within the $300,000 covered claim limitation and most workers' compensation claims are paid in full by guaranty funds. Thus, policyholders receive a far greater amount from guaranty fund payments than they would have recovered as estate distributions absent the guaranty funds.

15. Each guaranty fund is an association which consists of all licensed insurers writing the kinds of insurance covered by the guaranty fund in the state of the guaranty fund. See, e.g., M.G.L. c. 175D, §3 and § 1(4). Thus, any insurer which elects to write business in a particular state is a member of that state's guaranty fund and subject to the assessment mechanism described below.

16. In order to obtain the monies needed to pay claims each guaranty fund assesses its member insurers. See, e.g., M.G.L. c. 175D, §5(l)(c). Each state puts a dollar cap on guaranty fund assessments which can be made against an insurer in any given year. The cap is generally expressed as a percentage of the premium written by an insurer in the state of the guaranty fund in the year preceding the

assessment. See, e.g., M.G.L. c. 175D, §5(l)(c) (2% assessment cap). The assessment cap serves to avoid assessments causing a domino like series of insurer insolvencies, i.e. a large assessment causing additional insurers to become insolvent thereby necessitating further assessments on a smaller group of insurers with consequent additional insolvencies, further assessments, etc.

17. In light of the assessment cap, in order to provide an additional source of funds to pay claims each guaranty fund is assigned the policyholder's right on claims which the guaranty funds pay to recover from estate assets in liquidation as well as the priority the claimant would have had without the guaranty fund. See, e.g., M.G.L. c. 175D, §8. Guaranty funds generally have the same liquidation priority as policy holders. See e.g., M.G.L. c.175, §180F. In my experience policy holder claims, including guaranty fund claims, generally have a higher liquidation priority than general creditor claims.

18. Guaranty fund recoveries from estates reduce the need for assessments. In my experience estate recoveries have often been applied as an offset against guaranty fund assessments thereby reducing the amounts required to be paid to the guaranty fund by member insurers.

19. Guaranty fund recoveries from estates also serve to lessen the burden on insurance policyholders in general who ultimately fund the guaranty fund system. Insurers are entitled to recoup guaranty fund assessments in the form of higher insurance rates and premiums (see, eg., M.G.L. c. 175D, § 1 3) or in a few

states by premium tax offsets (see e.g., Ariz. Rev. Stat. Ann. §20-674) or policy surcharges (see, e.g., Hawaii Rev. Stat. §431:16-115). To the extent that funds are received by a guaranty fund from estate distributions guaranty fund assessments are decreased and the need for increased rates and premiums or other public burdens is consequently decreased.

20. In my experience a significant part of guaranty fund operations consists of pursuing guaranty fund recoveries from insolvent insurer estates. For example, the eight GFMS Funds have filed claims in at least 57 insurer estates (other than American Mutual) in 22 jurisdictions asserting more than $375 million in claims against those estates. Guaranty fund recoveries from estates have been substantial. More than $276 million has been recovered from insurer estates by the eight GFMS Funds. Such estate recoveries significantly aid the guaranty funds in paying policyholder claims and lowering the need for guaranty fund assessments on insurers and ultimately the burden on insurance policyholders generally.

21. Thus, statutory provisions giving a priority to guaranty fund claims in insurer estates protect policyholders and carry out the enforcement of insurance contracts by helping to ensure the payment of policyholders' claims despite t le insurer's insolvency. Such provisions giving a priority to guaranty funds also protect policyholders generally by reducing the need to increase rates and premiums which policyholders must pay to fund the guaranty fund.

22. As explained further below, a deadline for filing claims against the estate protects policyholders and carries out the enforcement of insurance contracts because it facilitates the closure of estates which could otherwise remain open for many years. Estate closure facilitates distributions to creditors earlier than would have occurred without closure. It also decreases administrative costs which otherwise reduce assets available for distribution to policyholders.

23. The liquidation of an insurer takes many years to complete, often more than a decade. The following is a list of certain insurer insolvencies which triggered one or more of the GFMS Funds. The list shows the date each insurer was placed into liquidation. Upon information and belief, all of the estates listed below remain open:

Insolvent Insurer	Date of Liquidation Order
Ambassador	09/04/84
Excalibur	09/05/84
Ideal Mutual	12/26/84
Early American	01/15/85
Eastern Indemnity	01/28/85
Union Indemnity	07/16/85
Commercial Standard	01/23/85
Transit Casualty	12/03/85
Carriers	01/16/86
Midland	04/03/86
Great Global	02/17/86
American Druggist	04/30/86
Allied Fidelity	07/15/86
Mission Insurance	02/24/87
Mission National	02/24/87
Enterprise	02/24/87

Integrity	03/24/87
Mission Reinsurance	02/24/87
American Interinsurance	08/31/88
American Mutual Liability	03/09/89
American Mutual of Boston	03/09/89
Stone Mountain	02/03/89
Ohio General	03/28/90
American Universal	01/08/91
Canadian Universal	02/05/91
Edison insurance	02/20/91
Western Employers	04/23/91
Rockwood Insurance	08/26/91
MCA Insurance	10/23/92
Atlantic & Pacific International Assurance	10/22/93
Employers Casualty Company	02/11/94
Covenant Mutual Insurance	05/04/94
Premier Alliance Insurance Co.	08/02/94
United Community Ins. Co.	07/07/94
Maine Residual Market Pool	07/01/95
Abington Mutual	11/01/95
Coronet Insurance	12/24/96
Grangers Mutual Ins. Co.	08/06/97
United Southern Ins. Co.	09/18/97
Quaker City	10/01/97
US Capital Ins.	11/20/97
American Eagle	12/22/97
First Central Ins. Co.	01/28/98
Capital Casualty	11/27/98
LMI Insurance	05/23/00
Trust Insurance Company	08/02/00
Hamilton Insurance Company	8/07/00
Superior National Ins.	09/26/00
Commercial Compensation Casualty Co.	9/26/00
California Compensation Insurance Co.	9/26/00

New England Fidelity	11/15/00
Credit General	01/05/01
International Indemnity	01/19/01

24. Liquidators are reluctant to make distributions to creditors until the amount of claims against the estate are known. This is because a liquidator who distributes estate assets to the then known claimants could later find out that there are other claims against the estate which were unknown or riot accurately quantified at the time of distribution. The liquidator might be in a position of having little or no assets to distribute to such claimants because of the earlier distributions. The liquidator would, as a practical matter, be unable to recoup distributions from claimants.

25. Attached hereto as Exhibit A is a true copy of an Order to Show Cause entered in In the Matter of the Liquidation of Midland Insurance Company (Supreme Court of the State of New York, County of New York, Index No. 41294/86). In Exhibit A, the liquidator of Midland Insurance Company ("Midland") states as follows:

Midland has been in liquidation almost fifteen years, each claim in this proceeding relates to an occurrence that occurred at least fifteen years ago. In many cases, claims relate to occurrences that are 20 or 30 years old. New claims based on environmental or product liability losses covered by Midland policies and reinsurance contracts will continue to be asserted for many years. Without a bar date, the possibility that there will be unanticipated claims development is greater. This uncertainty would make the payment of a dividend and the

establishment of an aggregate limit of liability much more difficult.... (Petition, p. 8, ¶23).

Although the bar date will bar long-tail creditors from presenting claims, it will benefit them by enabling them to receive payment on the portion of their claims that develop through the bar date. . . . (Petition, p. 8, ¶24).

26. Thus a claim filing deadline protects policyholders because it facilitates estate distributions earlier than might otherwise be possible.

27. A claim filing deadline also may incidentally benefit non-policyholder claimants. However, the vast majority of claims against an insolvent insurer's estate are typically claims under policies, including guaranty fund claims under statutory assignments of policyholder rights.

28. In summary, state statutes providing a priority for the payment of guaranty fund claims in insurer liquidation proceedings and providing for a claim filing deadline, such as M.G.L. c. 175, § 180F, operate to protect policyholders by helping to carry out the enforcement of insurance contracts by ensuring prompt payment of policyholders' claims. The priority statutes also protect policyholders by reducing the need for increased rates and the application of other statutory mechanisms used to fund the policyholder protection provided by guaranty funds.

Signed under oath on this 19th day of March, 2001.

/s/_____
Paul M. Gulko, President
Guaranty Fund Management Services

County: Suffolk
State: MA

Subscribed and sworn to this 19th day of March, 2001

/s/_____

Notary Public
My Comm. Expires 12/25/03

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party ~~by mail~~ (by hand) or overnight courier on 3/19/01.

/s/_____
Eric A. Smith

EXHIBIT A

At IAS Part 28 of the Supreme Court of the State of New York, County of New York, at the Courthouse, 60 Centre Street, New York, New York on the 15 day of February, 2001

PRESENT

HON. SCHOENFELD

JUSTICE.

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Index No. 41294/86

In the Matter of

ORDER TO SHOW CAUSE

the Liquidation of

MIDLAND INSURANCE COMPANY

----------x

UPON the annexed petition of RICHARD S. KARPIN, Assistant Special Deputy Superintendent and Agent of NEIL D. LEVIN, Superintendent of Insurance of the State of New York as Liquidator (the "Liquidator") of Midland Insurance Company ("Midland"), duly verified the 13th day of February, 2001 for an order in accordance with article seventy four of the Insurance Law:

- confirming and approving the Report on the Status of the Liquidation of Midland Insurance Company and Dividend Guarantee Reinsurance Proposal dated February 13, 2001 (the "Proposal");

- setting forth the terms of the Proposal;

- approving the Aggregate Reinsurance Agreement between the Liquidator and National Indemnity Company ("NICO") dated January 23, 2001;

- approving the Service Agreement between the Liquidator, NICO and Resolute Management dated January 23, 2001;

- establishing December 31, 2001 as the Bar Date as defined in the Proposal; and,

- providing for such other relief as is necessary to effectuate the Proposal and as is just; and furthermore

LET all policyholders, guaranty associations, reinsureds, creditors, reinsurers and other interested parties or their attorneys' show cause before this Court at IAS Part 28, 60 Centre Street, Courtroom 355, on the 11 day of June, 2001 at 9:30 a.m. or as soon thereafter as counsel may be heard, why an order granting the relief sought ~~in the petition~~ herein should not be granted;

AND, sufficient cause having been alleged therefore, let service of ~~notice~~ a copy of this order to show cause ~~and all supporting papers~~ [s/ms./j.s.c.] be made on the more than 10,000 policyholders, guaranty associations, reinsureds, creditors, reinsurers, and interested parties by mailing a notice in the form annexed hereto as exhibit 1, at least 45 days in advance of the above-scheduled return date; and, it is further

ORDERED, that the form and method of notice specified herein is the best notice practicable and shall constitute due and sufficient notice of this Order to Show Cause and the scheduled return date to all

persons and entities entitled to receive such notice; and it is further

ORDERED, that the approved form of notice shall direct that all answering papers be served on the Liquidator at least 15 days prior to the above-scheduled return date; and it is further

ORDERED, that no person or entity shall be entitled to object to the Proposal or otherwise be heard, except pursuant to the service of answering papers as set forth herein; and it is further

ORDERED, any person or entity that fails to serve answering papers as provided herein shall be deemed to have waived any objections to the petition or the Proposal and shall be barred from raising objections in this or any other proceeding.

ENTER

/s/_____
J.S.C.

MARTIN SCHOENFELD

Exhibit 1

IN THE MATTER OF THE LIQUIDATION OF MIDLAND INSURANCE COMPANY
Supreme Court of the State of New York
County of New York
Index No.: 41294/86

TO:

NOTICE

Neil D. Levin, Superintendent of Insurance of the State of New York, as Liquidator (the "Liquidator") of Midland Insurance Company ("Midland"), hereby gives you notice that he has presented the Court a Petition for an Order:

- confirming and approving the Report on the Status of the Liquidation of Midland Insurance Company and Dividend Guarantee Reinsurance Proposal (the "Proposal") dated February , 2001;
- setting forth the terms of the Proposal;
- approving the Aggregate Reinsurance Agreement between the Liquidator and National Indemnity Company ("NICO") dated January 23, 2001;
- approving the Service Agreement between the Liquidator, NICO and Resolute Management dated January 23, 2001;
- establishing, December 31, 2001 as the Bar Date as defined in the Proposal; and,
- providing for such other relief as is necessary to effectuate the Proposal and as is just.

The Petition, Proposal, Aggregate Reinsurance Agreement, and Service Agreement are available from the Liquidator upon request. The Proposal is summarized below. In the event of any discrepancy

between the summary herein and the documents, the documents control.

As of September 30, 2000, Midland's reported liabilities totaled $1,469,120,742, which includes allowed claims in the amount of $481,215,406 and reserves for pending direct claims and reinsurance claims in the amount of $975,000,778. Midland's assets totaled $689,950,826, which includes unrestricted cash and investments in the amount of $160,825,405 and projected reinsurance recoverables in the amount of $513,712,958.

Because the Liquidator is obligated to distribute Midland's assets, pro-rata, to all creditors whose claims are ultimately allowed, the significant uncertainties inherent in the Liquidator's reserves for losses and projections for recoverables has made it imprudent for the Liquidator to declare a dividend. In order to expedite the payment of dividends to creditors while assuring parity, the Liquidator is seeking approval of a Dividend Guarantee Reinsurance Arrangement by which NICO, subject to a $2 billion aggregate limit of liability, will pay a 32% dividend to all creditors for allowed claims. The Dividend Guarantee Reinsurance Arrangement also provides that:

- The Liquidator will pay NICO a premium equal to all of Midland's assets, including reinsurance recoverables on all paid and unpaid claims, less the amount of $2.3 million;
- Resolute Management, an affiliate of NICO'S, will administer the run-off of Midland pursuant to the Service Agreement;
- All claims reported after December 31, 2001 shall be barred and discharged;

- A percentage of the amount of all reinsurance recoveries made by the Liquidator, NICO or Resolute Management that exceed 50% of the total amount allowed shall be placed into an account and shall be applied to increase the aggregate limit of liability and/or to increase the dividend rate;
- Midland's reinsurers shall remain liable to Midland without diminution due to Midland's insolvency or the Aggregate Reinsurance Agreement.

The Court has scheduled a hearing on the Petition for _____, 2001 at 9:30 a.m. at the Courthouse, 60 Centre Street, New York, New York, Courtroom _____. If you wish to object to the Proposal, you must serve answering papers on the Liquidator on or before _____, 2001.

Service on the Liquidator shall be made by first class mail at the following address:

New York State Insurance Department
Liquidation Bureau
123 William Street
New York, New York 10038-3889
Attention: Midland Objections

Requests for further information should be directed to _____ at (212) 341-

NEIL D. LEVIN
Superintendent of Insurance of the
State of New York as Liquidator of
MIDLAND INSURANCE
COMPANY

Dated: New York, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of Index No.: 41294/86

the Liquidation of **PETITION**

MIDLAND INSURANCE COMPANY

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TO THE SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK:

RICHARD S. KARPRN, Assistant Special Deputy Superintendent of Insurance and agent of NEIL D. LEVIN, Superintendent of Insurance of the State of New York, as Liquidator (the "Liquidator") of Midland Insurance Company ("Midland") hereby petitions this Court, pursuant to article seventy-four of the New York Insurance Laws, for an order:

- confirming and approving, the Report on the Status of the Liquidation of Midland Insurance Company and Dividend Guarantee Reinsurance Proposal (the "Proposal") dated February 13, 2001;

- setting forth the terms of Proposal;

- approving the Aggregate Reinsurance Agreement between the Liquidator and National Indemnity Company ("NICO") dated January 23, 2001;

- approving the Service Agreement between the Liquidator, NICO and Resolute Management dated January 23, 2001;

- establishing December 31, 2001 as the Bar Date as defined in the Proposal; and,
- providing for such other relief as is necessary to effectuate the Proposal and as is just.

A copy of the Proposal is annexed hereto as Exhibit "A".

1. By order of this Court entered April 3, 1986 (the "Liquidation Order"), Midland was declared insolvent and placed into liquidation. A copy of the Liquidation Order is annexed hereto as Exhibit "B".

2. The Liquidation Order appointed then Superintendent of Insurance James P. Corcoran and his successors in office as Liquidator.

3. Pursuant to the Liquidation Order, the Liquidator was charged with, among other things:

a) identifying Midland's policyholders and creditors and notifying them to present their claims;

b) taking possession of and marshalling Midland's assets; and,

c) adjudicating the claims presented by Midland's policyholders and creditors and otherwise liquidating Midland's business pursuant to Article 74 of the New York Insurance Law.

4. The Proposal sets forth the Liquidator's report on the progress made in liquidating Midland to date and his plan to expedite payments to Midland's creditors through a dividend guarantee reinsurance arrangement with NICO and a service agreement with Resolute Management, an affiliate of NICO.

5. The salient aspects of the reinsurance arrangement are:

a) a reinsurance agreement with an aggregate limit of $2 billion (based on 100% of the value of all Allowed Claims as defined in the Proposal, without regard to the dividend rate) between the Liquidator and NICO covering all obligations of Midland by which NICO will pay a Guaranteed Dividend at the rate of 32% on Allowed Claims;

b) a premium payable to NICO in an amount equal to all of Midland's assets, including reinsurance recoverables on all paid and unpaid claims less the amount of $2.3 million, which the Liquidator will withhold to cover all of the ongoing administrative costs, known or unknown, of his activities through the duration of this proceeding;

c) a service agreement among the Liquidator, NICO and Resolute Management under which Resolute Management will administer the run-off of Midland;

d) the exclusion and barring of claims that have not been reported on or before December 31, 2001; and,

e) a provision for the creation of an account to fund an increase in the $2 billion aggregate limit and/or 32% Guaranteed Dividend rate if the total amount of all reinsurance recoveries exceeds 50% of the total amount allowed.

6. The proposed dividend guarantee reinsurance arrangement addresses the most pressing problem facing this proceeding - the payment of dividends. Midland has been in liquidation for almost 15 years. As of September 30, 2000, almost $500

million in claims have been allowed in this proceeding, but no dividends have been paid out of Midland's assets. The Liquidator has not been able to pay dividends because Midland's liabilities, which include claim and expense reserves of almost $1 billion, and Midland's assets, which consist primarily of reinsurance recoverable have been too uncertain to pay a dividend.

The Aggregate Reinsurance Agreement

7. Subject to the approval of this Court, the Liquidator and NICO have entered into the Aggregate Reinsurance Agreement dated January 23, 2001, which is annexed to the Proposal as Exhibit "B". (The Proposal is annexed hereto as Exhibit "A"). The Aggregate Reinsurance Agreement provides that NICO will pay a 32% Guaranteed Dividend for each claim allowed in this proceeding. In consideration, tile Liquidator will pay NICO a premium equal to all of Midland's assets, including the assignment of all of Midland's rights under reinsurance contracts, less $2.3 million, which the Liquidator will retain to pay ongoing administrative expenses.

8. As of September 30, 2000, Midland had unrestricted cash and invested assets totaling, $160,825,405 and Allowed Claims in the amount of $481,215,406. Upon approval of the Proposal, NICO will be obligated to pay out approximately $154 million, which is 32% of the amount allowed to date. Therefor, NICO will assume the entire credit risk of the collection of Midland's reinsurance recoverables.

9. Furthermore, NICO is an A++ rated reinsurer with a surplus to policyholders in excess of $25 billion that can be relied upon to meet its obligations under the proposed agreements.

The Dividend Rate

10. In accordance with Article 74 of the Insurance Law, all creditors are entitled to share, pro-rata, in the distribution of Midland's assets. Therefor, the Liquidator can only pay dividends at a rate that can be sustained through the adjudication of the last pending claim.

11. As of September 30, 2000, Midland's assets totaled $689,950,826 and its liabilities totaled $1,469,120,742. The assets include unrestricted cash and investments in the amount of $160,825,405 and projected reinsurance recoverables in the amount of $513,712,958. The liabilities include Allowed Claims in the amount of $481,215,406 and reserves in the amount of $975,000,778 for pending direct claims and reinsurance claims. It is quite possible that the projected reinsurance recoverables might not fully materialize and that the actual development of losses will exceed the current reserves.

12. The Liquidator never includes unrealized assets in determining whether to recommend the payment of a dividend. Conversely, the Liquidator always considers the possibility that the actual development of losses will exceed reserves until it is possible to verify that the reserves are adequate. In this case, if the current reserves turn out to be understated by 25%, Midland's ultimate liability will be $350 million greater than now reported.

13. If the Liquidator were to declare a dividend today, without the Proposal, the dividend rate would be based on the comparison of the current available assets, which is the cash and invested assets in the amount of $160,825,405 less a reserve for future administrative expenses, and the current liabilities in the amount of $1,469,120,742 plus a cushion for unanticipated development. Based on this

comparison, the Liquidator could not recommend a dividend rate of more than 5% at this time.

14. As of September 30, 2000, Midland's reported assets are equal to approximately 47% of Midland's liabilities. Assuming that Midland's liabilities and reinsurance recoverables develop as projected, the Liquidator ultimately would be able to pay creditors a dividend of approximately 47%. However, the Liquidator would not be able to pay dividends at that rate until a significant percentage of both the outstanding claims and projected reinsurance recoveries are resolved. This is not likely to occur for ten years or more.

15. The 32% Guaranteed Dividend has a significantly greater present value than a 47% dividend paid ten years from now. Furthermore, NICO, not Midland's creditors, will assume the credit risk of the collection of Midland's reinsurance recoverables over the duration of this proceeding. However, in the event that NICO is able to make greater reinsurance recoveries than the Liquidator has projected, Midland's creditors will share in the fruits of NICO's labors through the Proposal's contingent payment provision.

16. The Proposal provides that specified percentages of the total amount by. which total reinsurance recoveries made from the inception of this proceeding exceed 50% of the total amount of claims that are ultimately allowed shall be placed into an contingent payment account. The funds in this account shall be used to increase the $2 billion aggregate limit of liability provided for in the aggregate reinsurance agreement and/or to make an additional dividend payment in excess of the 32% Guaranteed Dividend.

17. For the foregoing reasons, the Liquidator has determined that the 32% Guaranteed Dividend provided for in the Proposal is fair and reasonable.

The Aggregate Limit

18. The Proposal provides that the Aggregate Reinsurance Agreement shall include a $2 billion aggregate limit of liability. The limit applies to the amounts allowed for claims, not the 32% Guaranteed Dividend payable on the claims. Therefor, NICO's liability for payments under the aggregate reinsurance, agreement is limited to $640 million. The limit includes all payments made for allocated loss adjustment expenses, which are all expenses that can be allocated to a specific claim, such as defense costs. However, the limit does not include unallocated loss adjustment expenses, which are general administrative expenses. In this case, NICO's unallocated loss adjustment expenses will consist solely of the fee paid to Resolute Management to administer the run-off of Midland pursuant to the Service Agreement, which is discussed below.

19. The Liquidator has determined that the aggregate limit of liability is sufficient to provide for the payment of the 32% Guaranteed Dividend for all claims that are ultimately allowed and to cover allocated loss adjustment expenses on those claims. As of September 30.1 2000, Midland's liabilities, including its reserves for outstanding claims and loss adjustment expenses, totaled $1,469,120,742. In order to exhaust the $2 billion aggregate limit of liability, there would have to be significant unanticipated claims development. Although it is quite possible that there will be unanticipated development, the Liquidator does not believe that the type of claims development that would exhaust the aggregate limit is likely, particularly in light of the proposed December 31, 2001 bar date, which is discussed below.

20. Nevertheless, there is a risk that the aggregate limit could be exhausted prior to the

payment of the 32% Guaranteed Dividend to all Midland Creditors.

21. This risk is acceptable in tile context of the Liquidator's obligation to balance the interests of Midland's short-tail and long-tail creditors. Short-tail creditors are creditors whose claims have matured and have been allowed by the Court. As of September 30, 2000, claims totaling almost $500 million have been allowed in this proceeding. These creditors have not received any payment from the Midland estate. Many of these creditors have been waiting many years. Long-tail creditors are creditors with pending claims that have not yet fully-matured. The reserves on these claims total almost $1 billion. The only way to insure beyond all doubt that the aggregate limit of liability would cover every claim would be to increase the aggregate to $2.5 billion or $3 billion. However, this would require a reduction in the 32% dividend rate. Based on the circumstances described herein, the Liquidator has concluded that the 32% dividend/$2 billion aggregate balance is tile right balance in this case. Furthermore, the aggregate limit's sufficiency is further enhanced by the Proposal's contingent payment provision, which could provide funds to increase the aggregate limit if it were to be exhausted prior to the payment of the Guaranteed Dividend to all creditors with Allowed Claims.

The December 31, 2001 Bar Date

22 The December 31, 2001 bar date also represents a balance between short tail and long-tail creditors. Under the Proposal, all claims reported prior to the bar date will be adjudicated, regardless of when they are resolved. Thus, all the claims included in the almost $1 billion in reserves reflected on Midland's balance sheet will be adjudicated in this

proceeding, However, no claims first reported after the bar date will be considered.

23. Midland has been in liquidation almost 15 years. Each claim in this proceeding relates to an occurrence that occurred at least 15 years ago. In many cases, claims relate to occurrences that are 20 or 30 years old. New claims based on environmental or product liability losses covered by Midland policies and reinsurance contracts will continue to be asserted for many years. Without a bar date, the possibility that there will be unanticipated claims development is greater. This uncertainty would make the payment of a dividend and the establishment of an aggregate limit of liability much more difficult. The Proposal could not be put into effect without it.

24. Although the bar date will bar long-tail creditors front presetting claims, it will benefit them by enabling them to receive payment on the portion of their claims that develop through the bar date. Midland's long-tail policyholders are either Major Policyholders, as defined in the Proposal, or insurance companies that are reinsured by Midland. As evidenced by reserves of almost $1 billion, a great number of claims have been reported by Major Policyholders and reinsureds for coverage under policies and reinsurance contracts prior to the bar date. The bar date, in conjunction with the Guaranteed Dividend, will allow Resolute Management, on behalf of the Liquidator, to finalize these claims with the Major Policyholders and reinsureds much more quickly than would be possible if there were no bar date and the dividend rate were nominal or undetermined.

The Service Agreement

25. Subject to the approval of this Court, the Liquidator, NICO and Resolute Management entered

into the Service Agreement dated January 23, 2001, which is annexed to the Proposal as Exhibit "C". (The Proposal is annexed hereto as Exhibit "A"). The Service Agreement provides that Resolute Management will administer all aspects of Midland's liquidation on behalf of both the Liquidator and NICO. Resolute Management's fee will be paid by NICO and will not reduce the S2 billion reinsurance limit or the 32% Guaranteed Dividend. Therefor, NICO will bear the costs of the continued run-off of the Midland estate through the conclusion of this proceeding.

26. Nevertheless, the Liquidator and this Court will retain ultimate authority over the conduct of this proceeding. The Service Agreement is subject to tile Proposal, which sets forth explicit procedures for the adjudication of claims that assure that Resolute Management will comply with the Liquidator's obligations under Article 74 of the insurance law and that due process will be afforded to all creditors.

Court Approval

27. For the reasons set forth above and in the Proposal, approval of tile Proposal is in the best interests of Midland's policyholders, creditors and other interested parties. In accordance with Article 74 of the Insurance Law, the Liquidator is subject to the supervision and direction of the Court. Therefor, I respectfully request that the Court grant the annexed Order to Show Cause, which provides for service of notice on over 10,000 interested parties and requests that the hearing on the petition be made returnable in June to afford the Liquidator sufficient time issue the required notices.

28. The Liquidator further requests that the Court, following the hearing, issue an order that:

- confirms and approves the Proposal;
- sets forth the terms of the Proposal;
- approves the Aggregate Reinsurance Agreement between the Liquidator and NICO dated January 23, 2001;
- approves the Service Agreement between the Liquidator, NICO and Resolute Management dated January 23, 2001;
- establishes December 31, 2001 as the Bar Date as defined in the Proposal; and,
- provides for such other relief as is just.

29. There has been no previous application for the relief sought in this petition.

WHEREFORE, It is respectfully requested that the Court grant the accompanying Order to Show Cause and, following the hearing, issue an order granting the relief sought herein.

Dated: New York, New, York
February 13, 2001

/s/
RICHARD S. KARPIN
Assistant Special Deputy Superintendent
And Agent of NEIL D. LEVIN,
Superintendent of Insurance of the State of
New York as Liquidator of Midland
Insurance Company

VERIFICATION

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

RICHARD S. KARPIN, being duly sworn, deposes and says:

I am a duly appointed Assistant Special Deputy Superintendent of Insurance and agent of Neil D. Levin, Superintendent of Insurance of the State of New York as Liquidator of Midland Insurance Company. The foregoing report is true to the best of my knowledge and information. The books and records of Midland Insurance Company maintained by the Superintendent of Insurance as Liquidator are the source of my knowledge and information.

/s/
RICHARD S. KARPIN
Assistant Special Deputy Superintendent

Sworn to before me this
13th day of February, 2001

/s/
Notary Public

MELVIN A. BURRUSS
Notary Public, State of New York
No. 02BU5050148
Qualified In Westchester County
Commission Expires October 2, 2001

EXHIBITS A & B

HAVE BEEN INTENTIONALLY OMITTED

DUE TO THEIR SIZE.

COPIES MAY BE

OBTAINED BY CALLING

ALAN J. COOKE, ESQ.

AT HUTCHINS, WHEELER & DITTMAR

AT (617) 951-6600

Supreme Court, U.S.
FILED
APR 7 2003
CLERK

Nos. 02-1124 and 02-1135

In the Supreme Court of the United States

JULIANNE M. BOWLER, COMMISSIONER OF INSURANCE OF MASSACHUSETTS, PETITIONER

v.

UNITED STATES, ET AL.

ALABAMA INSURANCE GUARANTY ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the federal government is bound by claim-filing deadlines established by a state court under a state law relating to insurance company insolvency proceedings.

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In the Supreme Court of the United States

No. 02-1124

JULIANNE M. BOWLER, COMMISSIONER OF INSURANCE OF MASSACHUSETTS, PETITIONER

v.

UNITED STATES, ET AL.

No. 02-1135

ALABAMA INSURANCE GUARANTY ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)[1] is reported at 303 F.3d 375. The decision of the district court (Pet. App. 21a-46a) is reported at 164 F. Supp. 2d 232.

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 02-1124.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2002. On October 11, 2002, the court of appeals denied the rehearing petition filed by petitioner in No. 02-1124 (Pet. App. 47a-48a). Petitioner in No. 02-1124 filed a petition for a writ of certiorari on January 27, 2003. On November 19, 2002, the court of appeals denied the petition for rehearing filed by petitioners in No. 02-1135 (Pet. App. 51a-52a). Petitioners in No. 02-1135 filed a petition for a writ of certiorari on January 28, 2003. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the relationship among the Federal Priority Statute, 31 U.S.C. 3713, the United States' immunity from state statutes of limitations, *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940), and the McCarran-Ferguson Act, 15 U.S.C. 1012(b), in the context of Massachusetts' insurance company insolvency scheme.

1. The Federal Priority Statute, 31 U.S.C. 3713, gives the federal government first priority for its claims against an insolvent entity's estate. It provides that a "claim of the United States Government shall be paid first when * * * a person indebted to the Government is insolvent and * * * an act of bankruptcy is committed." 31 U.S.C. 3713(a)(1)(A)(iii). It further provides that any representative of the estate who pays claims ahead of the United States' claims may be "liable to the extent of the payment for unpaid claims of the Government." 31 U.S.C. 3713(b). The statute has its roots in English common law, and some form of the statute has been in place since the Nation's founding. See *United States* v. *Moore*, 423 U.S. 77, 80-81 (1975).

The claims of the United States are not only entitled to a statutory priority, but are also beyond the reach of state limitations periods, unless Congress by statute provides otherwise. See *United States* v. *Thompson*, 98 U.S. 486, 488 (1878) ("a State statute cannot bar the United States"); *Summerlin*, 310 U.S. at 416 ("It is well settled that the United States is not bound by state statutes of limitations or subject to the defense of laches in enforcing its rights."); *United States* v. *Hoar*, 26 F. Cas. 329, 329 (C.C.D. Mass. 1821) (No. 15,373) (Story, J.) (deeming it "too plain for argument, that the statutes of limitations of Massachusetts cannot proprio vigore bind or bar the suits of the national government"). That rule has its roots in "the English law from a very early period," *Thompson*, 98 U.S. at 489; see *Hoar*, 26 F. Cas. at 330 (rule "has for several centuries universally prevailed"), and the United States' immunity to state limitations periods was "imparted to the new government as" one of the "incidents of the sovereignty" when "the national Constitution was adopted," *Thompson*, 98 U.S. at 489. The same principle is also reflected in the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, which subjects the disposition of federal property (such as choses in action) to congressional control.

Finally, notwithstanding the general rule that federal statutes ordinarily preempt conflicting state laws, Congress has provided a presumption against statutory preemption of state laws regulating "the business of insurance." In particular, the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of

> insurance * * * unless such Act specifically relates to the business of insurance.

15 U.S.C. 1012(b). Congress passed the McCarran-Ferguson Act to address the unanticipated effects of *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), in which this Court held that the issuance of an insurance policy was a transaction in commerce and therefore subject to the federal antitrust laws. *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 40-41 (1996). The McCarran-Ferguson Act serves to protect state regulation of the business of insurance against inadvertent federal intrusion. *Id.* at 39.

2. The American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston (collectively American Mutual) were declared insolvent in 1989. Pet. App. 22a-24a. Pursuant to state law, Mass. Gen. Laws ch. 175, § 180C, the Insurance Commissioner of Massachusetts (petitioner in No. 02-1124) was appointed permanent receiver in state court proceedings. Pet. App. 23a. Massachusetts law authorizes the state court supervising such proceedings to set a claim-filing deadline, although it does not impose any particular constraints on the choice of deadlines. Mass. Gen. Laws ch. 175, § 180F. The Massachusetts statute also provides the order in which claims are to be paid. See *ibid.*; Pet. App. 26a n.11. Under it, claims for administrative expenses are given first priority; the claims of policyholders, beneficiaries, insureds, and insurance guaranty funds are second; claims for the return of premiums are third; and claims of the United States (unless in a higher priority category) are fourth. Various other claims are assigned a lower priority. See *id.* at 26a n.11.

In March 1989, the receivership court ordered American Mutual's creditors to file their claims by March 9, 1990. Pet. App. 25a. The Department of Labor filed a claim for unpaid Longshore and Harbor Workers' Compensation Act assessments before the deadline, and other federal entities filed claims as well. Some federal claims were filed after the deadline, including claims under the Medicare Secondary Payer provision. *Id.* at 25a & n.7.

To facilitate the distribution of American Mutual's assets, the United States agreed to waive its rights under the Federal Priority Statute as to four early distributions to eligible state insurance guaranty funds as partial reimbursement of their claims against American Mutual's assets. (After paying the claims of an insolvent insurer's policyholders, state insurance guaranty funds often seek reimbursement from the insolvent insurer's estate.) Those early distributions totaled approximately $174 million, and by December 31, 1999, the guaranty funds had recovered about $308 million. Pet. App. 25a n.8; 02-1124 Pet. 13. The receivership court approved a proposed fifth distribution of about $10 million in 1999. The United States, however, declined to waive its priority rights for that distribution, because it was concerned that the remaining assets might be insufficient to cover its claims. Pet. App. 25a-26a. On May 14, 1999, the Massachusetts Insurance Commissioner filed a motion for approval of a liquidation plan "providing for denial of late filed claims," including those of the United States. *Id.* at 26a. That motion remains pending. *Id.* at 26a n.10.

On November 22, 2000, the Massachusetts Insurance Commissioner filed this declaratory judgment action against the United States and the Attorney General in his official capacity. The complaint described the action

as a suit "for non-monetary specific relief" with respect to "a federal agency's final action or failure to act." Compl. 2, ¶ 2. The complaint averred that, although the suit was against the United States and an officer in his official capacity, it was covered by the waiver of immunity contained in the Administrative Procedure Act, 5 U.S.C. 702, or was within this Court's holding in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Compl. 2-3, ¶ 2.

The complaint sought a declaration that, by dint of the McCarran-Ferguson Act, 15 U.S.C. 1012, Massachusetts' priority for the claims of "insurance guaranty funds" is not preempted by the Federal Priority Statute. It also sought a declaration that state law may bar the United States' claims if they are not timely filed. Pet. App. 21a. The district court observed:

> [T]he Receiver requests a declaration (A) in Count II, that she may pay the claims of insurance guaranty funds prior to non-policyholder claims by the federal government and (B) in Count I, that federal government claims are subject to the March 9, 1990 filing deadline set by the state receivership court.

Ibid.; see Compl. 11 (Prayer ¶¶ 1-2).[2]

The district court resolved the case on cross motions for dismissal and summary judgment. With respect to the priority for insurance guaranty fund claims, the court ruled in favor of the Massachusetts Insurance Commissioner. The district court explained that, in

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[2] The complaint also sought an order requiring the United States to "act on the Receiver's request for assent or a conditional waiver regarding the proposed fifth distribution to the guarantee funds." Compl. 11 (Prayer ¶ 3). That request for relief has never been acted upon. See pp. 20-21 note 11, *infra*.

United States Department of Treasury v. *Fabe*, 508 U.S. 491 (1993), this Court concluded that certain priorities in Ohio's insurance liquidation scheme were enacted "for the purpose of regulating the business of insurance" and therefore saved from preemption by the McCarran-Ferguson Act. In particular, the Court upheld priorities for administrative and policyholder claims notwithstanding the Federal Priority Statute. Those priorities, the Court stated, regulated "the business of insurance" because they were aimed at the insurer-insured relationship, *i.e.*, ensuring that the insurer would fulfill its promises. But the Court also concluded that other priorities had an insufficient relationship to the insurer-insured relationship to fall within McCarran-Ferguson. Pet. App. 29a-30a. In this case, the district court concluded that the priority for insurance guaranty funds, like the policyholder priority in *Fabe*, was "designed to protect policyholders of an insolvent insurer." *Id.* at 31a. The insurance guaranty fund system, the court stated, expedites payments to policyholders: The guaranty fund pays the insured immediately, but then seeks compensation (with a policyholder-level priority) against the insolvent insurer's estate. *Id.* at 31a-32a.

With respect to untimely claims, however, the district court granted summary judgment in favor of the United States, holding that Massachusetts cannot bar the United States' claims. The question, the court explained, is "controll[ed]" by the First Circuit's decision in *Garcia* v. *Island Program Designer, Inc.*, 4 F.3d 57 (1993). Pet. App. 40a. *Garcia* applied this Court's decision in *Fabe*, *supra*, to hold that the Federal Priority Statute preempts the Puerto Rico insurer liquidation statute's claim-filing deadline. In an opinion by then-Chief Judge Breyer, the court of appeals explained

that the deadline did not regulate "the business of insurance" within the meaning of the McCarran-Ferguson Act and *Fabe*, because it was "not *directed at* the protection of policyholders, insofar as it 'helps policyholders only to the extent that (and in the same way as) it helps all creditors.'" Pet. App. 36a (quoting *Garcia*, 4 F.3d at 62). *Garcia* also observed that the deadline was not "necessary for the protection of policyholders," and "liquidation would still prove manageable" without it. *Ibid.* (quoting *Garcia*, 4 F.3d at 62). The district court concluded that, "[u]nder any fair reading of *Garcia*," it was "obligated to" hold "that the Massachusetts filing deadline in insurance liquidation proceedings" is not covered by McCarran-Ferguson and is therefore "preempted by the federal priority statute." *Id.* at 40a.

3. The parties cross-appealed, and the court of appeals affirmed. Pet. App. 20a. Applying *Fabe*, *supra*, the court of appeals separately examined the two aspects of the Massachusetts scheme at issue. The court determined that the priority given to state insurance guaranty funds was sufficiently tied to the payment of policyholder claims to constitute regulation of the business of insurance within the meaning of the McCarran-Ferguson Act and *Fabe*. Pet. App. 6a-14a. It therefore held that the McCarran-Ferguson Act saved that priority from preemption by the Federal Priority Statute. The United States has not sought this Court's review of that ruling.

The court of appeals also concluded that, under *Fabe*, the claim-filing deadline was not enacted "for the purpose of regulating the business of insurance" and that, as a result, the McCarran-Ferguson Act did not save it from federal preemption. The court explained that its earlier decision in *Garcia* had already resolved that

issue. Pet. App. 15a. The court of appeals nonetheless added "a word about *Garcia*, partly to stress that it is consistent with the view we take of *Fabe*," which "draws the line at state law that focuses protection on policyholder claims." *Id.* at 16a. "An early bar date for the United States," the court reaffirmed, "has only a limited effect on policy holders—who have priority [under *Fabe*] anyway—and equally or primarily helps other general creditors." *Ibid.* "*Garcia*," the court stated, "correctly applied *Fabe*." *Ibid.*

The court of appeals noted that the lack of a firm bar date for federal claims could pose administrative difficulties, but emphasized that "this is a matter for the legislature, not the courts." Pet. App. 17a. Petitioner's effort to subject the United States to a one-year deadline was itself fraught with difficulty, the court stated, because it would subject the United States to a random patchwork of state-law claim deadlines. *Id.* at 18a. The court also noted that "the United States is likely limited as to some of its claims by a patchwork of federal statutes of limitations," *id.* at 17a, and that "the United States may give a waiver" of its rights, *ibid.*

Finally, the court of appeals granted the motion of various guaranty funds (petitioners in No. 02-1135) to intervene. Pet. App. 18a-19a. The court concluded that, because their interests were adequately represented by the Insurance Commissioner (petitioner in No. 02-1125), the guaranty funds could not intervene as of right. *Id.* at 24a. Although the court did not find that the district court had abused its discretion in denying the guaranty funds' motion for permissive intervention, the court of appeals exercised its "own discretion to allow" intervention "in the case at this time on a going-forward basis." *Id.* at 20a.

ARGUMENT

The court of appeals correctly concluded that a state limitations period cannot extinguish the claims of the United States. Its decision does not conflict with any decision of this Court or of any court of appeals, and faithfully applies this Court's decision in *United States Department of Treasury* v. *Fabe*, 508 U.S. 491 (1993). There are, moreover, potential jurisdictional defects that might prevent this Court from reaching the question on which petitioners seek review. Accordingly, further review is unwarranted.

1. Petitioners argue that, under the McCarran-Ferguson Act, state-imposed claim-filing deadlines in insurance insolvency proceedings bind the United States. The court of appeals correctly rejected that contention.

a. Petitioners do not dispute the longstanding and "well settled" rule "that the United States is not bound by state statutes of limitations or subject to the defense of laches in enforcing its rights," unless Congress provides otherwise by statute. *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940); *United States* v. *Thompson*, 98 U.S. 486, 488 (1878) ("a State statute cannot bar the United States"); *United States* v. *Hoar*, 26 F. Cas. 329, 329 (C.C.D. Mass. 1821) (No. 15,373) (Story, J.) (deeming it "too plain for argument, that the statutes of limitations of Massachusetts cannot proprio vigore bind or bar the suits of the national government"). Instead, petitioners rely on the anti-preemption provision of the McCarran-Ferguson Act, 15 U.S.C. 1012(b).

That provision states that "*[n]o Act of Congress* shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the

business of insurance * * * unless such Act specifically relates to the business of insurance." 15 U.S.C. 1012(b) (emphasis added). The rule that state limitations periods do not of their own force extinguish the United States' claims, however, is not an "Act of Congress" or the product of such an Act. It is instead one of the "incidents of * * * sovereignty" that, like sovereign immunity, was "imparted to the new government" when "the national Constitution was adopted"—a part of the constitutional design. *Thompson*, 98 U.S. at 489.[3] As a result, the McCarran-Ferguson Act has no bearing on that rule. And it certainly does not purport to waive the United States' immunity to state limitations periods or otherwise expose its claims to extinction by state law. Contrast 11 U.S.C. 502(b)(9), 101(27) (imposing deadline for claims submission by any "governmental unit," including "the United States," in federal bankruptcy cases). The purpose of the McCarran-Ferguson Act was "to protect state insurance regulation primarily against *inadvertent* federal intrusion," *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 39 (1996), not to surrender federal claims and property rights to state limitations periods.

b. Petitioners' argument also fails under *Fabe*, as the court of appeals properly held. In *Fabe*, this Court held that the McCarran-Ferguson Act's anti-preemption provision applies "to the extent" that a state law regulates the insurer-policyholder relationship. 508

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[3] As the Court explained in *Thompson*: "The exemption of the United States from suits, except as they themselves may provide, rests upon the same foundation as the rule of *nullum tempus* with respect to them. If the States can pass statutes of limitation binding upon the Federal government, they can by like means make it suable within their respective jurisdictions. The evils of such a state of things are too obvious to require remark." 98 U.S. at 490.

U.S. at 508. The Court also made it clear that a law "designed to further the interests of other creditors * * * is not a law enacted for the purpose of regulating the business of insurance." *Id.* at 508-509. Applying that analysis to the elements of the Ohio statute before it, the Court held that Ohio's statutory priority for administrative and policyholder claims regulated the business of insurance, because they ensured "actual performance of [the] insurance contract," a critical element of the insurer-policyholder relationship. *Id.* at 503-505, 508. The Court, however, held that the "preferences conferred upon employees and other general creditors * * * do not escape pre-emption because their connection to the ultimate aim of insurance"—risk spreading and allocation—"is too tenuous." *Id.* at 509.

In this case and in *Garcia* v. *Island Program Designer, Inc.*, 4 F.3d 57, 60-62 (1993), the First Circuit correctly applied *Fabe* to conclude that the McCarran-Ferguson Act does not save insurance insolvency limitation periods from preemption. As the First Circuit has twice explained (Pet. App. 16a; 4 F.3d at 62), such limitations periods are designed to aid in the resolution of the insolvency and to help creditors generally, rather than to affect the rights of policyholders; they thus benefit policyholders only to the degree that they benefit creditors generally. *Fabe* explicitly rejects the argument that "indirect effects are sufficient for a state law to avoid pre-emption under the McCarran-Ferguson Act." 508 U.S. at 508-509. The First Circuit thus correctly held that a general claim-filing deadline does not regulate the business of insurance and does not fall within the McCarran-Ferguson Act's anti-preemption provision.

c. Contrary to the suggestion of petitioners in No. 02-1135 (at 14-16), the decision in this case is consis-

tent not only with *Fabe* but also with *Humana Inc.* v. *Forsyth*, 525 U.S. 299 (1999), and *UNUM Life Ins. Co.* v. *Ward*, 526 U.S. 358 (1999). In *Humana*, the Court concluded that permitting plaintiffs to invoke the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, against an insurance company did not "invalidate, impair, or supersede" Nevada's laws regulating the business of insurance, even though the federal and state remedies were not precisely parallel. 525 U.S. at 313. There was no dispute, however, that the Nevada laws at issue there were enacted for the purpose of regulating the business of insurance. Thus, the only question was whether the federal law "invalidate[d], impair[ed], or supersede[d]" the Nevada laws. *Id.* at 306-314. Here, in contrast, the question is whether the claims deadline is a law enacted "for the purpose of regulating the business of insurance." That question is controlled by *Fabe*, not *Humana*.

Further, while petitioners in No. 02-1135 invoke *UNUM Life* for the unremarkable proposition that courts evaluating preemption should consider whether state laws specifically address policy issues unique to the insurance context, the First Circuit did exactly that here. It concluded that, unlike the law at issue in *UNUM Life*, claims deadlines in liquidation are not unique to insurance regulation, and benefit all creditors generally, rather than policyholders in particular. That is especially true where, as here, actual policyholders—who should be identifiable by the receiver and have a priority in any event—should be unaffected by late-filed federal creditor claims. *Fabe* makes it clear that state laws are not automatically protected by

McCarran-Ferguson merely because they deal with insurer insolvency.[4]

2. Petitioners' contention that the lower courts are divided (02-1124 Pet. 21-26; 02-1135 Pet. 11-14), is likewise incorrect. See Pet. App. 15a & n.6 (explaining that petitioner in No. 02-1124 "perhaps overargues" that "a few courts elsewhere have not agreed with *Garcia*"). First, while petitioners argue that "the Tenth, Fifth, and Second Circuit[s] * * * have taken a broader view of the protection accorded state insurer liquidation," 02-1124 Pet. 23; see 02-1135 Pet. 11-14, not one of the court of appeals cases they cite—*Munich Am. Reins. Co.* v. *Crawford*, 141 F.3d 585 (5th Cir.), cert. denied, 525 U.S. 1016 (1998); *Davister Corp.* v. *United Republic Life Ins. Co.*, 152 F.3d 1277 (10th Cir. 1998), cert. denied, 525 U.S. 1199 (1999); and *Stephens* v. *American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995)—addresses claim-filing deadlines, much less deadlines that purport to extinguish the rights of the United States. To the contrary, those cases concerned the relationship between the McCarran-Ferguson Act and the Federal Arbitration Act, as petitioners concede (02-1124 Pet. 24). The only federal court of appeals to have addressed the question presented here is the First Circuit—in this case and in *Garcia*, *supra*—a consideration that itself weighs against further review.[5]

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[4] The court of appeals' suggestion that "the dissenting position in *Fabe*" might some day "prevail," Pet. App. 9a, undermines rather than supports petitioners' position. The dissenters in *Fabe* would have held that no part of the Ohio insolvency statute, not even its priority scheme, is a law "enacted . . . for the purpose of regulating the business of insurance." 508 U.S. at 514 (Kennedy, J., dissenting).

[5] Petitioners also assert a conflict with a district court case, *Boozell* v. *United States*, 979 F. Supp. 670 (N.D. Ill. 1997). But that

Two of the cases cited by petitioners (the Second Circuit's decision in *Stephens* and the Tenth Circuit's decision in *Davister*), moreover, cite the First Circuit's *Garcia* decision with apparent approval, as the court of appeals pointed out. Pet. App. 15a-16a n.6 (citing *Davister*, 152 F.3d at 1281 n.5, and *Stephens*, 66 F.3d at 45). The Fifth Circuit's decision in *Munich* merely notes a "potential difference in approach between *Stephens* and *Garcia*." *Id.* at 16a n.6 (citing *Munich*, 141 F.3d at 592). And any difference is readily explained by the distinct questions presented. Unlike the effort to bar the United States' claims at issue here and in *Garcia*, the invalidation of arbitration clauses in private insurance and reinsurance policies at issue in *Stephens* clearly regulates the terms of policyholder and reinsurance contracts; it thus falls within the McCarran-Ferguson Act's anti-preemption rule. See *Stephens*, 66 F.3d at 44-45 (upholding anti-arbitration rule because it directly "regulates the performance of insurance contracts" and thus "is crucial to the 'relationship between [an] insurance company and [a] policyholder'") (quoting *Fabe*, 508 U.S. at 501).

For similar reasons, petitioners (02-1124 Pet. 22; 02-1135 Pet. 10) err in relying on *State ex rel. Clark* v. *Blue Cross Blue Shield of West Virginia, Inc.*, 510 S.E.2d 764 (W. Va. 1998), which involved a distinct statutory scheme. Here, the Massachusetts Insurance Commissioner sought a ruling that would permit "denial" of "late-filed claims," including those of the United States. Pet. App. 26a; pp. 5-6, *supra*. In contrast, the West Virginia statute at issue in *Clark* accorded lower

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case is not binding precedent even within the Northern District of Illinois. See, *e.g.*, *Howard* v. *Wal-Mart Stores, Inc.*, 160 F.3d 358, 359 (7th Cir. 1998).

priority to late-filed claims, but did not attempt to extinguish them altogether. *Clark*, 510 S.E.2d at 781. The West Virginia Supreme Court relied on that difference, holding that "a state may impose a limitation date on federal claims against an insolvent insurance company * * * *when that date merely subordinates the priority of late-filed federal claims rather than causing them to be absolutely invalidated.*" *Id.* at 779 (emphasis added). The court repeatedly emphasized that difference. "[N]o proofs of claim are rendered void or invalid due to their untimely filing," it reiterated, and "[c]onsequently, [the statutory provisions in issue] do not violate the principle that the United States is not bound by state statutes of limitation." *Id.* at 781.[6] *Clark* thus turned at least in part on the fact that the statute there, unlike the one here, did not seek to void or invalidate the United States' claims. There thus is no conflict between this case and *Clark*, and petitioners would not prevail even under *Clark*'s rationale.[7]

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[6] See *Clark*, 510 S.E.2d at 779 (distinguishing state laws "that completely abrogated the government's claim or suit"); *id.* at 780 ("Unlike a statute of limitation, the time limitation and claim subordination imposed by [West Virginia law] do not prohibit the United States from bringing its claim.").

[7] For that reason, the concerns that *Clark* expressed about the result in *Garcia* are not properly presented by the petition; this case would have been resolved the same in either court. *Clark*'s conclusion that a state insurance liquidation statute may accord untimely claims by the United States a lower priority than timely filed policyholder claims is also consistent with *Garcia*'s suggestion that a trustee "would have to provide, for example, the United States with a first priority so long as he had, say, actual notice (or 'constructive' notice through recording) of the claim" if "he did not have formal notice through a 'proof of claim' filed directly in the liquidation proceeding." 4 F.3d at 62. While we do not necessarily agree with the result in *Clark*, particularly insofar as it purports to

Petitioners also indulge in hyperbole when they claim that the court of appeals' decision has the practical effect of preventing receivers from paying policyholder claims. In fact, the court of appeals' decision expressly upholds Massachusetts' statutory *priority* for policyholder and guaranty fund claims; it thus promotes rather than impedes distributions to those claimants. See Pet. App. 10a-14a. Petitioners' prophecies, moreover, are at odds with the fact that the law of the First Circuit they challenge, regarding state-law filing deadlines for United States' claims, has been settled for nearly a decade now, since *Garcia*. And the decision in this case nowhere declares that States cannot pay timely policyholder claims ahead of untimely policyholder claims for which they have no notice (including those of the United States). See pp. 16-17 note 7, *supra*. Thus, as the court of appeals observed, an earlier "bar date for United States claims has only a limited effect on policyholders—who have priority anyway." Pet. App. 16a; *Garcia*, 4 F.3d at 62 (without bar date, liquidation of policyholder claims "would still prove manageable").

Petitioners also appear to understate the protection offered by federal limitations periods,[8] the ability of receivers to limit their exposure by examining the

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subordinate untimely United States policyholder claims to non-policyholder claims, neither *Clark* nor its rationale conflicts with the First Circuit's decision here.

[8] A number of courts have held that government claims in cases like this one are subject to the statutes of limitations set forth in 28 U.S.C. 2415-2416. See, *e.g.*, *United States* v. *Moriarty*, 8 F.3d 329, 332-333 (6th Cir. 1993) (holding that 28 U.S.C. 2415(a)'s six-year limitations period for contract actions applied to action against debtor's representative under 31 U.S.C. 3713(b)); *United States* v. *Dawkins*, 629 F.2d 972, 975 (4th Cir. 1980) (same).

insurer's policy records, and the extent to which the United States cooperates with state officials to facilitate claims resolution. Here, for example, the United States voluntarily waived its asserted priority to permit $174 million in early distributions. See Pet. App. 25a-26a & n.9; 02-1124 Pet. 13. Petitioners, however, neither sought the United States' cooperation following the filing of notices of appeal in this case in late 2001, nor after the court of appeals resolved the legal uncertainty surrounding the United States' and petitioners' rights in October 2002. Nonetheless—in light of the court of appeals' resolution of the legal rights of the parties and further research—the United States has contacted counsel for petitioner in No. 02-1124 to propose a resolution petitioner had once proposed herself, see Pet. App. 67a.

3. Finally, we note a potential jurisdictional barrier to further review, not yet addressed by the parties or the courts. Because this lawsuit was brought against the United States and the Attorney General in his official capacity in an effort to limit the claims and property rights of the United States, federal courts lack jurisdiction over it absent an Act of Congress waiving the United States' immunity to suit. See *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-690 (1949) (suit seeking to bar government's sale and delivery of its coal to anyone but respondent is an action against the sovereign); see *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 101-102, 112-113 (1984) (suit for decree that operates against sovereign is an action against the sovereign). "The terms of [the] waiver of sovereign immunity define the extent of the court's jurisdiction," *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986), and must be strictly construed in favor

of the sovereign, *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992).[9]

The complaint in this case (at 11, ¶ 2) relied on the waiver of immunity contained in the Administrative Procedure Act (APA), 5 U.S.C. 702. That waiver, however, applies only to suits brought under the APA itself—that is, suits for judicial review of final "agency action," 5 U.S.C. 702, requesting that the action be held unlawful and set aside, or that action unlawfully withheld or unreasonably delayed be compelled, 5 U.S.C. 706.[10] As this Court has explained, any plaintiff

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[9] Sovereign immunity is sufficiently "jurisdictional in nature," *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994), that the issue can be raised for the first time on appeal, *Finn* v. *United States*, 123 U.S. 227, 232 (1887); cf. *Patsy* v. *Board of Regents*, 457 U.S. 496, 516 n.19 (1982) (sovereign immunity "sufficiently partakes of the nature of a jurisdictional bar that it may be raised by the State for the first time on appeal" (internal quotation marks omitted)). It likewise cannot be waived by the actions of individual executive officers. *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Finn*, 123 U.S. at 232-233; see *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983) (waiver must be enacted by Congress).

[10] That is clear from the waiver's location—it appears as part of the APA in 5 U.S.C. 702 rather than as a free-standing enactment—and its legislative history. See *Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 105 (1976) (testimony of then-Assistant Attorney General Scalia) ("an important factor in our support for the bill" is "that the waiver of immunity, since it is made via section 702, will only apply to claims relating to improper official action; and will be subject to the other limitations of the Administrative Procedure Act"); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 11 (1976) ("Since the Amendment is to be added to 5 U.S.C. section 702, it will be applicable only to functions falling within the definition of 'agency' in 5 U.S.C. section 701."). The waiver's authors expressed the same view: "Because the amend-

"claiming a right to sue [under Section 702] must identify some 'agency action' that affects him in the specified fashion"; and "it is judicial review 'thereof' to which he is entitled." *Lujan* v. *Defenders of Wildlife*, 497 U.S. 871, 882 (1990).

Here, petitioners do *not* challenge final agency action, or seek to have such action set aside. Nor do they seek to compel agency action that has been withheld. Rather, they ask the Court to address *en vacuo* the validity of a state statute that purports to extinguish the United States' right to money or property, without regard to the propriety of any federal conduct. Indeed, the only part of the complaint that even arguably addressed agency action appears to have been abandoned.[11] Because petitioners have neither "identif[ied]

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ment is to be added to 5 U.S.C. § 702 (a provision of the Administrative Procedure Act entitled right of review)," the Chairman of the ABA's Administrative Law Section explained, "it will be applicable only when that provision is applicable." *Sovereign Immunity: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 59 (1970) (statement of Dan M. Byrd, Jr.); *id.* at 222 (testimony of Prof. Kenneth Culp Davis) ("Because the amendment is to be added to 5 U.S.C. §§ 702 and 703 * * * it will be applicable only when those provisions are applicable."); *id.* at 238 (testimony of Prof. Roger Cramton) ("The proposal is an amendment to the Administrative Procedure Act" and thus "is applicable only to administrative conduct * * * that is contemplated for judicial review by the APA.").

[11] Petitioner's *only* claim relating to agency action was Count III, which asserted that the United States "unreasonably delayed action" on the request for a waiver of its priority rights. Compl. 11, ¶ 35; see *ibid.* (Prayer ¶ 3) (requesting order requiring the United States to act on request for assent). That allegation and the associated prayer for relief, however, were never addressed by any court, and petitioners do not press them in this Court. They are not, moreover, cognizable under the APA. Under 5 U.S.C.

some 'agency action' that affects [them] in the specified fashion" nor sought "judicial review" of that agency action, *Lujan*, 497 U.S. at 882, their claim does not arise under the APA and is not covered by the waiver of immunity provided therein.

For similar reasons, the complaint (at 3, ¶ 2) errs in suggesting that *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. at 689-690, authorizes this suit. *Larson* held that an action seeking to prohibit an authorized federal officer from selling and delivering federal property to anyone but the plaintiff *is* an action against the sovereign itself—and therefore barred by sovereign immunity—because it seeks disposition of the sovereign's property. 337 U.S. at 688. The same is true of petitioner's suit, which seeks to terminate the United States' claims against the estate. Petitioner, furthermore, has identified no unconstitutional or otherwise *ultra vires* conduct (much less final agency action) that (by legal fiction) may be deemed individual conduct rather than that of the United States itself. See *Larson*, 337 U.S. at 689-690; *Pennhurst*, 465 U.S. at 102, 104-105, 112-117. The resulting jurisdictional doubts weigh heavily against further review.[12]

701(a)(2), no provision of the APA (including the waiver of immunity in Section 702) applies where "agency action is committed to agency discretion by law." Decisions concerning whether or when to enforce the rights of the United States are, barring constitutional infirmity, ordinarily committed to agency discretion by law within the meaning of Section 701(a)(2). See *Heckler* v. *Chaney*, 470 U.S. 821, 830, 835-837 (1985); *Lincoln* v. *Vigil*, 508 U.S. 182, 191-192 (1993). As to such decisions, there is "no law to apply." *Webster* v. *Doe*, 486 U.S. 592, 599 (1988).

[12] There may have been a similar issue lurking in the record in *Fabe*, but it appears to have passed unnoticed. See *Pennhurst*, 465 U.S. at 119 ("[W]hen questions of jurisdiction have been passed on

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2003

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in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."); *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not considered as having been so decided as to constitute precedent."); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (where issue was not "raised in briefs or argument nor discussed in the opinion," decision is not "binding precedent on th[e] point").

Supreme Court, U.S.
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Nos. 02-1124, 02-1135

IN THE

Supreme Court of the United States

JULIANNE M. BOWLER, in her official capacity as the Commissioner of Insurance of the Commonwealth of Massachusetts and Permanent Receiver of American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston,

-and-

ALABAMA INSURANCE GUARANTY ASSOCIATION, *et al.*,

Petitioners,

v.

UNITED STATES; JOHN ASHCROFT, in his official capacity as Attorney General of the United States,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR NATIONAL CONFERENCE OF INSURANCE GUARANTY FUNDS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In the present case, the court of appeals concluded that "[a]n early bar date for United States claims has only a limited effect on policyholders" in insurance insolvencies. This conclusion is contrary to the record in this estate and in estates nation-wide, and led the circuit court to incorrectly apply *United States Dept. of the Treasury v. Fabe*, 508 U.S. 491 (1993). The bar date plays a vital role in allowing timely payments to policyholders, and squarely implicates the "business of insurance" under the McCarran-Ferguson Act. If the federal government may ignore the bar date, the federal government could continue to indefinitely hold hostage payments to policyholders.

This case presents the following question: Does a bar date in a state's statutory scheme regulating the liquidation of insurance companies apply to claims of the United States because it "regulates the business of insurance" under the McCarran-Ferguson Act?

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INTEREST OF *AMICUS CURIAE*

Amicus National Conference of Insurance Guaranty Funds ("NCIGF") is a national association of member property and casualty insurance guaranty funds of the 50 states, the District of Columbia and Puerto Rico. *Amicus* presents this Memorandum to the Court because it is uniquely positioned to offer a national perspective demonstrating how claims-filing deadlines ("bar dates") in property and casualty insurance insolvencies directly "further the goal of protecting policyholders" under the Supreme Court's decision in *United States Dept. of the Treasury v. Fabe*, 508 U.S. 491 (1993) ("*Fabe*"). Bar dates are a practical necessity for the payment of policyholders.

This case is of substantial significance to the NCIGF and its members due to the financial ramifications and administrative uncertainty that will result in insurance insolvencies if the Court concludes that the federal government is not bound by bar dates.[1]

STATEMENT OF THE CASE

This case arises from the liquidation of two insolvent insurance companies, American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston (collectively "American Mutual"), and the application of two state statutory provisions to claims made by the United

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1. *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation and submission of this brief. *Amicus* is filing this brief with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.

States. In 1989, a Massachusetts state court appointed the state's Commissioner of Insurance as the Receiver of American Mutual. The state court also ordered all creditors of American Mutual to file claims with the Receiver by March 9, 1990.

The United States contended that, pursuant to the Federal Priority Act, 31 U.S.C. § 3713 (2000), it was entitled to priority distributions and immune from the one-year bar date. Under the Federal Priority Act, the Receiver is personally liable for the non-payment of valid claims by the United States. 31 U.S.C. § 3713(b) (2000). Because the assets of American Mutual are insufficient to satisfy all outstanding claims, the Act's potential personal liability is a live threat to the Receiver.

The Receiver then brought the underlying action. The district court held that the one-year bar date did not "regulate the business of insurance" and was thus preempted by the Federal Priority Act. *Ruthardt v. United States*, 164 F. Supp. 2d 232 (D. Mass. 2001). Though supportive of the Receiver's position on the merits, the district court explained that it was constrained by the decision in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993). The circuit court affirmed this decision. *Ruthardt v. United States*, 303 F.3d 375 (1st Cir. 2002).

SUMMARY OF THE ARGUMENT

The circuit court concluded that:

> An early bar date for United States claims has only a limited effect on policyholders — who have priority anyway — and equally or primarily helps other general creditors.

Ruthardt, 303 F.3d at 385. This conclusion of a "limited effect on policyholders" is the crux of the circuit court's decision. The conclusion is contrary to the record in this estate and the reality of other estates nation-wide. In fact, as demonstrated below, the bar date plays an essential role in allowing timely payments to policyholders, a function that squarely implicates the McCarran-Ferguson Act.[2] *Fabe*, 508 U.S. at 506 (a "statute is enacted 'for the purpose of regulating the business of insurance' to the extent that it serves to ensure that, if possible, policyholders ultimately will receive payment on their claims") (citation omitted).

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2. "Policyholders" refers to all denizens of the second priority of the liquidation claims priority statute (the "policyholder priority"), which includes all first- and third-party claimants and all guaranty fund claims. A first-party claimant is the holder of the insurance policy, a third-party claimant is not the holder, but has rights of recovery under the policy. For instance, with a car accident, the car owner has a first-party claim against his insurer, and a third-party involved in the accident may have rights of recovery against the car owner and thus under the car owner's policy. The guaranty funds, through their early payments to both first- and third-party claimants, are subrogated to their rights. "Policyholders" in this brief refers to all such persons having rights under the policies, unless otherwise stated.

If the bar date is not enforced against the federal government, the Receiver will not distribute funds to policyholders. The Receiver's declination is not petulance: the Receiver faces the prospect of personal liability under the Federal Priority Act. If the Receiver distributes the remaining funds to policyholders and thereafter the federal government — perhaps years from now — submits policyholder claims, the Receiver will have no means of payment, and thus will be exposed to personal liability to the federal government for such claims.

The result of the federal government's position is that the federal government may indefinitely hold hostage the Receiver's planned payments to policyholders. This result — which is the current status of this estate — cannot possibly be consistent with the McCarran-Ferguson Act.

REASONS FOR GRANTING THE PETITION

I. Without a Binding Bar Date, the Threat of Future Federal Policyholder Claims Creates Gridlock for Final Payment of All Policyholders.

The federal government has submitted only one policyholder claim to date in the American Mutual estate. It is thus tempting to infer that this case involves only late-filed, general creditor claims of the federal government. This inference, however, is not accurate. This dispute does not, as the federal government has asserted below, turn on a small amount of late-filed claims.

Instead, the dispute revolves around whether the federal government will submit additional *policyholder* claims at some point *in the future*. No one knows whether the federal

government will do so, but the risk that the federal government will do so is substantial enough that, coupled with the Receiver's potential for personal liability, the prospect of such claims has paralyzed the distribution process.

The Receiver has ample reason to worry that the federal government may someday file additional policyholder claims. Liability claims, even those incurred at the time of liquidation, may not be known and determined until years later, particularly where large commercial insurers are involved.[3] And sorting out, with finality, all the claims of the federal government potentially takes many years because, as its counsel put it in simple terms in the proceedings below, the government is huge. To be sure, the federal government's unwillingness, after fourteen years, to issue a final waiver of claims in this liquidation cements the Receiver's concern.

A. Because Distributions Are Pro Rata By Class, Delay in Identifying and Liquidating Federal Policyholder Claims Delays Final Payment of All Policyholder Claims.

Under the Massachusetts liquidation claims priority statute (as in every other state), distributions are made by priority. 1st Priority claims are paid in full first, then 2nd Priority claims are paid in full, and so on through the lower priorities. Lower priority claims receive nothing until higher priority claims are first paid in full. Claimants within a

3. By contrast, most general creditor claims are likely to be identified at or shortly after the liquidation commences. For example, supplier claims, which are a common type of general creditor claim, are typically either on the books of the insolvent insurer at the time of the liquidation or are billed shortly thereafter.

priority share ratably in a distribution. For example, a partial 2nd Priority distribution must be shared pro rata among 2nd Priority policyholder claimants.

In this estate — as is the case in almost all property and casualty insurer insolvencies — there are funds to pay in full the administrative expenses of the liquidation (1st Priority), but there are not enough funds to pay all policyholder claims (2nd Priority) in full, nor any funds to pay lower priority claims anything at all. *Thus, the only practical issues are how much money certain policyholder claimants (2nd Priority) will receive, and when they will receive it.*

The chart below illustrates the priorities and how they work here:

Liquidation Claims Priority	Will Be Paid?	Relevance to This Dispute
1st Administrative Expenses	Yes, in full	None
2nd Policyholder Claims (Including Future Federal Policyholder Claims)	Yes, partially	Under *Ruthardt*, they will not be paid until all future federal policyholder claims are resolved or waived.
3rd Unearned Premium Claims	No	None (1) There are insufficient funds to reach these priorities; and (2) Even if funds might be available, under *Ruthardt*, no payment could occur until higher priorities are satisfied in full, which could not happen without definitively knowing the extent of future federal policyholder claims.
4th General Creditor Federal Claims	No	
5th Wage Claims	No	
6th State and Local Tax Claims	No	
7th General Creditor Claims	No	

If the Receiver does not know the extent of the federal government's policyholder claims, then she cannot determine how much to distribute to *any* policyholders. With no bar to the federal government filing policyholder claims in the future, the Receiver cannot determine how much to ratably distribute within the policyholder class.

To distribute funds to policyholders, the Receiver must first calculate:

$$\frac{\text{\$ Available to Distribute}}{\text{Total \$ Amount of Policyholder Claims}} = \text{Payment \%}$$

And then for each policyholder claimant:

$$\text{Payment \%} \times \text{Individual Policyholder Claim} = \text{Policyholder Payment}$$

If the federal government cannot, or will not, identify the extent of its policyholder claims, then the Receiver cannot know the denominator ("Total $ Amount of Policyholder Claims"), and thus without this figure cannot calculate the proper payment percentage for any policyholder. This uncertainty results in paralysis.

No policyholder distribution will occur unless:

- The Receiver wants to gamble on there being no future federal policyholder claims; or
- The federal government waives its future policyholder claims.

The Receiver cannot be faulted for not gambling. Nor has the federal government waived future policyholder claims, even though this liquidation began fourteen years ago, and the policies on which its claims would be based are at least that old.

The district court aptly observed that actual "late-filed federal *policyholder* claims may substantively, and rather directly, interfere with the timely and orderly distribution of funds to general creditors." *Ruthardt v. United States*, 164 F. Supp. 2d at 244. Unfortunately, the district court did not discuss the devastating effect of the mere threat of late-filed federal policyholder claims on the "timely and orderly distribution of funds" to other policyholders — the only class of claimants with any chance of recovery.

Because the bar date is "reasonably necessary to further the goal of protecting policyholders," and "serves to ensure that . . . policyholders ultimately will receive payment on their claims," *Amicus* NCIGF respectfully requests that the Court find that the bar date falls within the scope of the McCarran-Ferguson Act. *Fabe*, 508 U.S. at 506, 509.

B. Bar Dates Are a Ubiquitous Necessity That Deserve the Same McCarran-Ferguson Protection as Administrative Costs.

Bar dates are as necessary to an orderly liquidation as the preferential payment of administrative costs. In *Fabe*, the Court found that, "[w]ithout payment of administrative costs, liquidation could not even commence," and thus ruled that administrative costs are "reasonably necessary to further the goal of protecting policyholders." Similar recognition of necessity is due bar dates for the reasons above. Without a

bar date, the most important aspect of the insurance liquidation process — the distribution of assets to policyholders — cannot occur.

There is no question that liquidators and guaranty funds throughout the fifty states see bar dates as a practical necessity. *See, e.g., Mercado Boneta v. Adminstracion Del Fondo de Compensacion al Paciente*, 125 F.3d 9, 18 (1st Cir. 1997) ("Absent a claims bar date, neither the affairs of PCFA nor the interest of pending claims could be finalized."). They are not merely "convenient." Bar dates do not exist simply to make the liquidator's job easier, but instead exist to make the liquidator's job possible, and thus to protect the interests of policyholders.

As such, the importance of bar dates to an orderly liquidation easily satisfies the requirements articulated in *Fabe* and its progeny. *See, e.g., Stephens v. American International Insurance Co.*, 66 F.3d 41, 45 (2nd Cir. 1995) (a state liquidation anti-arbitration law "has the end, intention, or aim of adjusting, managing or controlling the business of insurance, in that it *regulates the winding up of an insolvent insurance company*") (internal quotations omitted) (emphasis added); *Boozell v. United States*, 979 F. Supp. 670, 675 n.3 (N.D. Ill. 1997) (applying the "'end, intention, or aim of adjusting, managing, or controlling the business of insurance'" standard set forth in *Fabe* to find that the McCarran-Ferguson Act applies to the bar date).

To the best of *Amicus* NCIGF's knowledge, there has *never* been a property and casualty insurance liquidation without a claims bar date. The bar date may result in a complete cut-off of claims, or, alternatively, it may result in the subordination of late claims. *See, e.g., Clark v. Blue Cross*

Blue Shield of West Virginia, 510 S.E.2d 764, 780 (W. Va. 1998). Regardless of the individual circumstances, a bar date is always established in a property and casualty insurance insolvency proceeding. The bar date is indispensable to the administration of the estate.

The crucial role of bar dates in the administration of bankruptcy cases is also undeniable. *See, e.g., In re Drexel Burnham Lambert Group, Inc.*, 148 B.R. 1002, 1009 (S.D.N.Y. 1993) ("[Ignoring the bar date] would require recomputation . . . of everything which had occurred in reliance on the claims timely filed . . . , the promulgation of the Plan of Reorganization ... and the distributions of assets already made. . . ."); *In re Stern*, 70 B.R. 472, 475 n.4 (Bankr. E.D. Pa. 1987) (ignoring the bar date "would destroy the objective of finality which Congress obviously intended to promote"); *In re Milan Steel Fabricators, Inc.*, 113 B.R. 364, 367 (Bankr. N.D. Ohio 1990) ("The requirement that creditors file proofs of claim within a limited time . . . is necessary if cases are to be administered effectively.").

In the liquidation of insurance companies, bar dates are no less crucial, particularly where, as here, *future* federal policyholder claims are the threat.

*****

The circuit court concluded that the Federal Priority Act — enacted in 1789 by the very first Congress — ill fits the circumstances of the twenty-first century. 303 F.3d at 385 ("In a complicated liquidation, understandably the Commissioner . . . does not know exactly what claims the United States has so far failed to discover and assert. Some uniform limit is plainly needed."). *Amicus* NCIGF submits

that the trouble is far greater than perceived by the circuit court. Unless the Court recognizes that bar dates protect policyholders under the McCarran-Ferguson Act, the final payment of policyholders in insurance insolvencies nationwide will continue to be threatened by possible future federal policyholder claims. Because the federal government has still not waived such claims fourteen years after the American Mutual receivership began, now is the time to recognize the overwhelming, practical importance of bar dates for policyholders under *Fabe* and to hold the federal government subject to the bar date.

CONCLUSION

For the reasons stated above, *amicus* NCIGF respectfully urges the Court to grant the Petition.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ALABAMA INSURANCE GUARANTY ASSOCIATION, ET AL.,

Petitioners,

v.

UNITED STATES AND JOHN ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY BRIEF

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Dated: April 17, 2003

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STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, the Petitioners incorporate the corporate disclosure statement made in the Petition for Writ of Certiorari and state that it is current.

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PETITIONERS' REPLY BRIEF

Pursuant to Supreme Court Rule 15.6, the Guaranty Funds submit this reply to address new arguments made in the Brief for the Respondents in Opposition ("U.S. Opp. at ___.").

I. *UNITED STATES V. SUMMERLIN* DOES NOT APPLY BECAUSE CONGRESS HAS CEDED AUTHORITY TO THE STATES FOR THE REGULATION OF THE BUSINESS OF INSURANCE.

The United States contends that *United States v. Summerlin*, 310 U.S. 414 (1940), should be the beginning and the end of the inquiry as to whether the state time bar applies to the United States. *Summerlin* held that the United States is not bound by state statutes of limitations unless Congress provides otherwise. *Id.* at 416. The United States further contends that *Summerlin* is outside the scope of McCarran-Ferguson because McCarran-Ferguson states that "no act of Congress" shall be construed to preempt a state law "regulating the business" of insurance. The United States reasons that because the principle espoused in *Summerlin* is not an "Act of Congress," McCarran-Ferguson has no bearing, and *Summerlin* therefore applies. The United States puts the cart before the horse.

If the Court were to approach the issue as the United States proposes, the Court would be substituting federal common law for subsequent explicit legislation of Congress. The federal common law principle that the United States is not subject to state statutes of limitations is a general principle that preceded the McCarran-Ferguson Act. As the United States notes in its opposition, the McCarran-Ferguson Act was a specific act by Congress in reaction to the Court's decision in *United States v. South-Eastern*

Underwriters Ass'n, 322 U.S. 533 (1944). U.S. Opp. at p. 4. Congress carved out the specific field of the "business of insurance" for regulation by the states. For any federal law to regulate the business of insurance, such law must specifically relate to the business of insurance. 15 U.S.C. § 1012 (stating that no federal act shall preempt a state law of insurance, "unless such Act specifically relates to the business of insurance"). To the extent that any pre-existing general law, such as the *Summerlin* principle, may have affected the "business of insurance," McCarran-Ferguson changed the scheme.

Adopting the United States' interpretation of the McCarran-Ferguson Act would defeat the Act's very purpose to cede the regulation of insurance to the states. The United States' interpretation would allow federal common law, rather than state law, to regulate the business of insurance. The fact that *Summerlin* is not "an Act of Congress" is irrelevant.

Instead, the Court must look to the McCarran-Ferguson Act and determine whether the state time bar "regulates the business of insurance." If it does, then the time bar falls clearly within the scope of McCarran-Ferguson. It is only if the Court determines that the time bar is not a law regulating the business of insurance that *Summerlin* would play any role in this case.

II. THE UNITED STATES MISREADS AND FAILS TO APPLY THE PRINCIPLES SET FORTH IN *FABE*.

In its preliminary discussion of the case, the United States describes *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 509 (1993), as holding that certain state provisions "'regulated the business of insurance' because they were aimed at the insurer-insured relationship, i.e., ensuring that the insurer would fulfill its promises." U.S. Opp. at p. 7. Indeed, the time bar is aimed at the insurer-insured

relationship because, without it, no receiver will make distributions to policyholders for fear of being held liable for subsequently filed claims of the United States. Thus, no policyholders will be paid in breach of the promise made by the insurer. The United States, however, never addresses the relationship between the time bar date and the insurer-insured relationship. Instead, the United States seizes upon the Court of Appeals' twice misapplied reading of *Fabe*.

In *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993), and now in *Ruthardt*, the Court of Appeals interpreted *Fabe* to preclude reverse preemption of the state time bar on the basis that the time bar benefited policyholders and general creditors to the same or similar degree. As demonstrated by the uncontradicted factual record, however, the time bar has a substantially greater effect on policyholders than on general creditors because policyholders are given priority over other creditors. Moreover, given the limited amount of assets available for distribution in this estate, the policyholders are the only persons who will be paid and thus are the only persons benefited by the time bar. A similar effect is present in most estates inasmuch as estate assets are limited and policyholders tend to receive greater recoveries than general creditors. Pet. App. 73a, at ¶ 27.

Not only did the Court of Appeals misapprehend the extent of the time bar's impact on policyholders, it misread *Fabe*. The concomitant benefit to general creditors and policyholders does not preclude reverse preemption *provided the statute is reasonably necessary to further the goal of protecting policyholders*. *Fabe*, 508 U.S. at 509. Just like the Court of Appeals, the United States failed to apply this standard. Enforcement of a time bar is more than reasonably necessary to further the goal of protecting policyholders and ensure that the promise of the insurer is upheld. The time bar is just as necessary to

protect policyholders as the administrative expense priority upheld in *Fabe*. An incidental benefit to general creditors did not preclude McCarran-Ferguson protection for the administrative expense priority upheld in *Fabe*. An incidental benefit to general creditors from the time bar should not preclude McCarran-Ferguson protection for the time bar.

III. THE DECISION OF THE COURT OF APPEALS HAS THE PRACTICAL EFFECT OF PREVENTING THE RECEIVER FROM PAYING POLICYHOLDER CLAIMS.

At page 17 of its opposition, the United States makes the remarkable proposition that the Receiver can somehow make payments on timely policyholder claims despite outstanding claims of the United States for which the Receiver has no notice. U.S. Opp. at p. 17 ("And the decision in this case nowhere declares that States cannot pay timely policyholder claims ahead of untimely policyholder claims for which they have no notice (including those of the United States)"). Such position has never before been expressed by the United States in the context of the American Mutual liquidation. Indeed, this comment underscores the misapprehension by the courts and the United States of the reality that no Receiver in any liquidation, for fear of personal liability, will make distributions without assurance that all federal claims have been made or otherwise waived. No such assurance or waiver has been provided here nor in many other similar liquidation proceedings. Receivers, policyholders, and guaranty funds now need the Court to determine whether the United States may hold this key to the completion of insurer liquidation proceedings nationwide.

IV. THERE IS NO JURISDICTIONAL BARRIER TO FURTHER REVIEW BY THE COURT.

As its final argument in opposition to the petitions, the United States raises the issue of jurisdiction as one "not yet addressed by the parties or the courts." U.S. Opp. at p. 18. To the contrary, jurisdiction was addressed by the Receiver in her Complaint, therefore warranting no further attention from the parties, the District Court, or the Court of Appeals - until now, as the United States seeks to avoid the Court's final review of the time bar issue.

In her Complaint, the Receiver alleged federal question jurisdiction under 28 U.S.C. § 1331, given the material questions arising under two federal statutes - the McCarran Ferguson Act, 15 U.S.C. § 1012, and the Federal Priority Act, 31 U.S.C. § 3713. Complaint, ¶ 2. Also in her Complaint, the Receiver addressed sovereign immunity by asserting that the action is one for "non-monetary specific relief concerning a federal agency's final action or failure to act which have substantially impaired the Receiver's ability to discharge her obligations under Massachusetts law," thus falling within the waiver provided under the Administrative Procedures Act ("APA"), 5 U.S.C. § 702. Complaint, ¶ 2. In the alternative, the Receiver asserted that the action is one falling within the *ultra vires* exception under *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90 (1949), because the Attorney General has acted beyond the scope of his statutory authority. The Receiver was correct on both grounds.

A. The action was properly brought under the Administrative Procedures Act.

The United States challenges jurisdiction under the APA, contending that the Receiver has not sought to challenge final agency action nor to compel agency action that has been withheld. Such a position,

however, is contrary to the face of the Complaint and to the consistent treatment of the dispute by both the parties and the courts. In her Complaint, the Receiver alleges that:

> The United States, acting by and through the Department of Justice and defendant Attorney General Reno, has asserted that all federal claims are entitled to a first priority under 31 U.S.C. § 3713, notwithstanding the priorities for distribution or time limits for claims established by state law.

Complaint, ¶16. The Receiver further alleges that "[t]he United States has taken the position that claims by it are not subject to time limits imposed by state law for claims against the estates of insolvent insurers." *Id.* at ¶ 17.[1]

It is the stated final position of the United States, as expressed through the Attorney General, that the United States is not subject to state insurer insolvency bar dates. That stated position is the final agency action from which relief is sought. Indeed, such position has resulted in the indefinitely stalled insolvency proceedings of AMLICO and AMI, like so many other insurer insolvency proceedings nationwide, causing substantial injury to the Receiver, policyholders, and guaranty funds. As alleged:

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[1] Count III of the Receiver's Complaint sought an order, pursuant to 5 U.S.C. § 706, that the United States act upon the Receiver's request for assent or conditional waiver to a fifth distribution. During the course of the litigation, the United States denied the Receiver's request, and the District Court therefore found Count III to be moot. *See* Pet. App. 49a, n.30. The United States' contentions that the claim for relief from the United States' failure to act was abandoned and never addressed by any court are without merit. U.S. Opp. at p. 20.

> [i]f the Receiver distributes assets upon approval of the Supervisory Court, and the position of the United States later prevails, the Receiver faces potential personal liability under 31 U.S.C. § 3713 (b). Thus the position of the United States prevents her from performing her duties to complete the liquidation of the Companies under state law.

Complaint, ¶ 21.

The position of the United States and comments of the courts below reflect the Receiver's proper construction of the Complaint as seeking relief from final agency action. *See, e.g.,* Complaint, Exhibit B (United States Department of Justice asserting "priority status" on behalf of "the United States its departments, agencies and instrumentalities" and stating "[t]o the extent Massachusetts law is inconsistent with federal law in this regard, *it is inapplicable*") (emphasis added); Pet. App. 4a (First Circuit Court of Appeals stating that "[t]he United States has asserted throughout that . . . the one-year bar date does not apply to any of its claims"). Thus, the action properly falls within the scope of the APA. The action seeks judicial review of and non-monetary specific relief from the final position of the United States, as expressed by the Attorney General, which position continues to adversely affect the Receiver, policyholders, and guaranty funds. *See Lujan v. Defenders of Wildlife*, 497 U.S. 871, 882 (1990) (holding that plaintiff may be entitled to judicial review under § 702 if the complaint properly identifies agency action that affects plaintiff in a specified fashion).

B. In the alternative, the action was properly brought under *Larson v. Domestic & Foreign Commerce Corp.* because the Attorney General has acted outside of his statutory authority.

Under *Larson v. Domestic & Foreign Commerce Corp.*, an action may be brought against a federal officer for specific relief when either (1) the officer is acting beyond the scope of his statutory authority or (2) the statute conferring such authority is claimed to be unconstitutional. 337 U.S. 682, 689-90. The current action falls within the first category of cases in which the federal officer is alleged to have acted outside the scope of his authority. In such cases, the officer is not acting as the sovereign, the sovereign therefore is not being sued, and accordingly no waiver of sovereign immunity is required.

In this case, the Attorney General is acting outside the scope of his authority by asserting claims that conflict with the statutory constraints explicitly imposed by Congress in the McCarran-Ferguson Act. McCarran-Ferguson carved out the business of insurance for regulation by the states. By asserting that the state time bar must yield to the Federal Priority Act, the Attorney General violates state law and McCarran-Ferguson. McCarran-Ferguson limits the authority of the Attorney General in areas where the states have regulated the business of insurance. Here, the Attorney General has sought to exercise his authority despite reverse preemption explicitly dictated by Congress, therefore acting *ultra vires* to his authority.

The United States attempts to liken the current action to the circumstances in *Larson* which led the Court to conclude that an action should not lie against the federal officer, i.e. the Court's finding that the action sought to dispose of the sovereign's property and therefore was a suit against the

sovereign. U.S. Opp. at p. 21. Here, however, the action does not seek to deprive the United States of property. Instead, the action seeks to determine the interplay between federal and state laws in light of the reverse preemptive scheme established by McCarran-Ferguson, ultimately determining how a federal claim against an insolvent insurer should be brought, not whether such a claim may be brought.

The fact that a decision in favor of the Receiver may result in the United States being unable to assert certain claims is not determinative. In the event the Court finds the United States is subject to the time bar, the unasserted claims of the United States will have been lost by the United States' failure to act and would not be viable property interests to begin with. The facts in *Larson* have no bearing on the outcome here. Rather the legal principles in *Larson* provide an alternative basis for the current suit against the Attorney General of the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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